

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-1072
76-2015

**United States Court of Appeals
For the Second Circuit**

THE UNITED STATES,

vs.

JOHN CAPRA, a/k/a "Hooks", et al.,
Defendants-Appellants.

*On Appeal from the United States District Court for the
Southern District of New York*

B
P/S

Appellant's Appendix

SANTANGELO & SANTANGELO
Attorneys for Defendants-Appellants
253 Broadway
New York, N.Y.



TABLE OF CONTENTS

	<u>Page</u>
Docket Entries	1
Extention of Eavesdropping Warrant	14
Affidavit in Support of Extension of Eavesdropping Warrant of Frank S. Hogan.....	17
Affidavit of George Eaton In Support of Renewal of Eavesdropping Warrant	19
Affidavit of Hipolito Navarro	41
Notice of Motion Dated November 20, 1975	43
Affidavit of Barry Ivan Slotnick sworn to November 20, 1975	44
Transcript of Proceedings in the Court of Common Pleas of Lucas County, Ohio December 4, 1973	53
Affirmation of Barry Ivan Slotnick	78
Affidavit of Gerald A. Feffer sworn to December, 1975	89
Petition for Rehearing and Suggestion for Rehearing En Banc	92
Application Pursuant to 28 USC 2255	106
Petition of Barry Ivan Slotnick Dated Dec. 9, 1975.	107
Affidavit of Gerald A. Feffer sworn to Dec., 1975..	110
Memorandum Decision of Frankel, D.J.	115

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE FRANKEL

73 CRIM. 450

D. C. Form No. 100 Rev.

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U.S.: 261-5470

vs.

Lawrence S. Feld, AUSA

2/3/76

For Defendants:

- 1) JOHN CAPRA, a/k/a "Booky" all counts
- 2) LEOLUCA GUARINO, a/k/a "Soike" all counts
- 3) STEPHEN DELACAVA, a/k/a "Beansy" all counts
- 4) JOHN CARUSO ct. 1
- 5) ROBERT JERMAIN, a/k/a "Frank" cts. 1, 2, 3, 4, 5
- 6) GEORGE HARRIS, a/k/a "Cincinnati" ct. 1
- 7) EARL SLIS ct. 1
- 8) ALAN MORRIS, a/k/a "Underworld" ct. 1
- 9) JOSEPH MESSINA ct. 1
- 10) JACK EPCHIN ct. 1
- 11) CARMELO GARCIA, a/k/a "Chino" cts. 1 & 6

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	1/16/76	FELDER	5 -	5 -
J.S. 3 mailed 1, 2, 3, 5, 6, 7	Marshal	1/16/76	THOMAS	5 -	5 -
(9-11) Violation 9, 11 (HCLST)	Docket fee	1/16/76	MELODY	5 -	10 -
Title					
Sec.					
see below					
---SIX COUNTS---					

DATE	PROCEEDINGS
25:7237(1) and 21:812 - Conspiracy to violate narcotic laws (cts. 1)	
26:14725(2) and 7237(2) - sale of heroin, I not in pursuance of written order (cts. 2)	
21:812, 21:1(a)(1) and 21:1(b)(1)(A) - dist. and poss. with intent to dist. heroin, I (cts. 1, 3, 5)	
5-15-73	Filed indictment and ordered sealed for 30 days. E/W ordered. -- Ryan, J. E/W issued.
5-21-73	Indictment unsealed this date in District Court -- Frankel, J. case assigned to Judge Frankel as a related matter (1 CR 111)
5-21-73	JERMAIN- Filed affirmation of Leonard J. Levenson and notice of motion for an order releasing defendant on a P.R. - ret. 5-21-73 at 4:15 P.M.
5-22-73	JERMAIN- Filed affirmation of Leonard J. Levenson in request to release dist. on a P.R. pending trial.

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DATE

PROCEEDINGS

- 5-21-73 Alan Morris- Court directs entry of not guilty plea. Deft. remanded.
Cacra, Guarino, Bellacava, Jermain, Harris, Cassini & Arcola - All defendants enter
plea of not guilty. Bails set on 73 CR 331 carried to this indictment.
10 days for motions.
- 5-22-73 Jermain- (Atty. present) Application for reduction of bail granted. Bail previously
set at \$75,000. on indictment 73 CR 331 is vacated. Bail conditions on this
indictment are as set forth in Attorneys (Leonard J. Levinson) affirmation
dtd. May 22, 1973 and filed on 5-22-73, which are:
Deed of the home of Jean Ferricks and
\$2,000. cash to be posted by Lucille Fife with the clerk of the court.
In addition a \$15,000. P.R.E. is to be posted which is to be co-signed
by deft. and Christine Igueli, Carol Ann Dirperio and Paula E. Dirperio.
Deft. is to report daily to the U.S. Atty. Bail limits to include
Eastern District of New York. Deft. remanded. -- Frankel, J.
- 23-73 GEORGE HARRISON-Filed notice of motion for reduction of bail-Ret. 5-24-73.
- 25-73 Jarmain-Filed appearance bond #22833; in the sum \$15,000.00 dtd.5/24/73
- 25-73 Morris-Filed copy of deft's financial affidavit.
- 5-21-73 MORRIS- Deft. produced on writ from Wayne County Jail, Detroit, Mich. Joseph I.
Stone appointed counsel by court under C.J.A. No bail set. - writ adj. to
June 2, 1973 -- Frankel, J.
- 5-24-73 HARRIS- (Atty. present) Application for reduction of bail granted. Bail is set at
\$75,000. P.R.E. secured by \$2,000. cash and deed to home of Miss Williams.
Miss Williams to co-sign bond. The same bail conditions apply to 73 CR 392
Deft. remanded in lieu of bail. -- Frankel, J.
- 5-25-73 STONE- Stuart Holtzman, Esq. appointed as counsel under C.J.A. Deft. enters plea of
not guilty. Bail as set in Eastern District of Mich., \$1,000. P.R.E. Sec.
by \$200. continued on this indictment. -- Frankel, J.
- 5-25-73 Morris-File appointment of CJA Atty Joseph I. Stone 277 Broadway.
- 5-31-73 Carmelo Garcia- Filed the following motions this day:
Filed motion to disclose electronic surveillance.
Filed motion to disclose inducement, promises and payments to
prospective Government witnesses.
Filed motion for severance pursuant to Rule 14.F.R.C.P.
Filed motion to inspect Grand Jury minutes.
Filed motion for discovery and inspection.
Filed motion for bill of particulars.
Filed motion to produce evidence favorable to the defendant.
Filed motion for identification hearing.
- 4-73 Guarino-Filed affirmation and notice of motion to suppress.
- 6-73 A.MORRIS - Filed affirmation & notice of motion for a bill of particulars, discovery
& inspection for a severance etc..
- 4-73 Robert Jermain- Filed affirmation and notice of motion for a bill of particulars, discovery
Bail conditions as originally set on 5-24-73

DATE	PROCEEDINGS
6-15-73	Jermain-Filed memo endorsed on defts application for modifications of defts bail conditions., Application denied. Frankel, J.
6-15-73	ROBERT JERMAIN-Filed memo endorsed on motion filed 6-6-73 Application denied. So Ordered. Frankel, J.
6-21-73	John Capra- Filed defendants memorandum of law.
6-20-73	Dellacava-Filed deft's memorandum of law
7-20-73	ALL DEFTS.-Filed Memorandum Counsel-Court is unable to reach motions & trial until mid-September.--Frankel, J. Mailed notices 7-23-73.
7-26-73	Filed Gov't Bill of Particulars.
7-30-73	Filed afdv. of Gerald A. Faffer, AUSA DTD. 6-19-73
7-30-73	Filed afdv. of Lawrence S. Feld, AUSA dtd. 6-19-73
7-30-73	CARMELO GARCIA -Filed memo endorsed on motion to inspect G.J. minutes..MOTION DENIED Frankel, J.
7-30-73	CARMELO GARCIA -Filed memo endorsed on motion to disclose electronic surveillance Motion granted on consent. So ordered. Frankel, J.
7-30-73	C. GARCIA -Filed memo endorsed on motion for severance...Motion denied..Frankel, J.
7-30-73	Filed afdv. of Lawrence S. Feld, AUSA dtd. 6-20-73
7-30-73	Filed Gov't memorandum of law
7-30-73	Filed CAPRA'S REPLY memorandum
7-30-73	Filed Memorandum..The motion for particulars by DELLACAVA and GUARINO--the Court concludes that the items to which the Govt consents supply sufficient particulars ****The foregoing embodies the court's order--No settlement is necessary.... Frankel, J.... Mailed notice...
7-30-73	J. CAPRA - Filed memorandum****The motion to dismiss superseding indictment is denied. Motion for discovery of grand jury minutes is denied. The motion to suppress *** denied without prejudice..The demand for discovery and a bill particulars is granted to the extent of the govts consent. Etc.... Frankel, J. Mailed notice.
7-30-73	A. MORRIS-Filed memorandum**The Govt has consented in considerable measure to the relief sought by the motion of deft dated 6-1-73 Except in the respect hereinafter granted, the remaining items of the motion are denied...Frankel, J. M/N
7-30-73	Filed afdv. of L.S. Feld, AUSA dtd. 6-19-73..
7-30-73	CARMELO GARCIA - Filed memo endorsed on motion filed 6-31-73..This motion contains more uncritical boiler plate than able counsel ought to permit--the gov't has made discriminating judgments and consented to the proper items of discovery. Except to the extent of that consent, this motion is denied...So ordered...Frankel, J.
8-20-73	ALL DEFTS - Filed Gov't's notice of readiness for trial,
8-1-73	Filed Transcript of record of proceedings, dated July 30, 1973
8-23-73	LEOLUCA GUARINO - Received letter from Russell & McAlevy dtd 8-10-73 stating that they appear as counsel.

DATE	PROCEEDINGS
Aug. 29-73	S. DELLACAVA - Filed notice of motion & advt. to suppress evidence
Sept. 4-73	S. DELLACAVA - Filed stipulation that Lawrence K. Fittell, Esq. of 1150 B'Way N.Y.C. is substituted as trial counsel in place of Michael L. Santangelo
Sept 5-73	S. DELLACAVA - Filed advt. of G.A. Pfeffer, AUSA dtd 9-5-73 in opposition to motion to suppress.
Sept 5-73	J. CAPRA - Filed defts Affidavit & Notice of Motion for an order dismissing the indictment or for a hearing in order to suppress all evidence seized herein or for a severance, and for such other further relief as to this Court may seem just and proper
Sept 5-73	J. Capra - Filed defts memorandum of law.
Sept 5-73	Filed letter of Barry Ivan Slotnick dated 9-5-73.
Sept 5-73	Filed memorandum for minimization hearing****A hearing is set to commence on the morning of Sept 17, 1973 (Notice mailed)
9-6-73	S. DELLACAVA - Filed notice of motion & advt. to suppress evidence..
9-10-73	J. GUARINO - Filed notice of motion for an order admitting Dennis D. J. McAlvey, Esq. pro hoc vice as atty. for Leoluca Guarino
9-10-73	(S. DELLACAVA) (J. GUARINO) Filed notice of motion & advt. to suppress evidence
9-10-73	(J. CAPRA) *
9-10-73	(S. DELLACAVA) (J. GUARINO) Filed notice of motion & advt. 1. declaring the 1st Count of the indictment duplicitous 2. Striking the alias Spike 3. Suppressing information gained as a result of the illegal arrest etc.
9-11-73	J. MESSINA - Filed advt. & notice of motion to suppress evidence with memo endorsed. IN This motion is denied.....Frankel, J.....m/n
9-11-73	J. MESSINA - Filed Govt's memorandum in opposition to motion to suppress.
9-13-73	G. GARCIA - Filed advt. of L.S. Feld, AUSA for aax a Writ of Habeas Corpus
9-14-73	ALL DEFTS - Filed supplemental bill of particulars.
9-17-73	GEORGE HARRIS - Filed Second Offender Information
9-17-73	LEOLUCA GUARINO - Filed Second Offender Information
9-17-73	MAI MORRIS - Filed Second Offender Information
9-17-73	STEPHEN DELLACAVA - Filed Second offender Information
9-17-73	STEPHEN DELLACAVA - Second Offender Information under indictment 0123-464
9-17-73	STEPHEN DELLACAVA - Filed Information - 0123-465
9-17-73	J. CAPRA - Filed memo endorsed on motion filed 9-10-73... Motion granted. So ordered Frankel, J.

DATE	PROCEEDINGS
9-20-73	ROBERT JERMAIN - Filed notice of motion for an order covering the debts, pursuant to Rule 14.
9-20-73	ROBERT JERMAIN - Filed debts memo of law.
9-20-73	ALAN MORRIS - Filed notice of motion to suppress.
9-20-73	STEVEN DELLACAVA (JOHN CAPRA) Filed affidvts of both debtors dtd. 9-20-73.
9-24-73	ALAN MORRIS - Filed Order To Show Cause re: criminal contempt on 10-1-73, Frankel, J.
9-24-73	STEPHEN DELLACAVA, et al. - Filed debt. Dellacava's memo of law regarding Suppression of the April 13-73 Search Product.
9-20-73	ROBERT JERMAIN motion for severance, and memo-endorsed - Upon further consideration as a result of this motion, I have concluded that the statement giving rise to the motion will be excluded. Hence, while it has served an obviously useful purpose, the motion is no longer necessary. It is accordingly, denied. So Ordered, Frankel, J. (m/n)
9-24-73	Earl Sims - Filed Defendants Financial Affidvt.
9-26-73	GEORGE WARRIS - Filed USA copy of appointment of David Blackstone, Esq., 335 5th Ave, NYC as counsel for defendant - Frankel, J.
10-9-73	STEVEN DELLACAVA - Filed affidt & notice of motion for an order suppressing certain statements of the debt.
9-17-73	Minimization hearing commenced
9-18-73	Cont'd. Debt Garcias's bail exonerated. Bail in the amount of \$5,000 cash or surety bond set by the court...Remanded.
9-19-73	Hearing cont'd.
9-20-73	Hearing cont'd.
9-21-73	Hearing cont'd.
9-23-73	Hearing cont'd.
9-25-73	Hearing cont'd.
9-25-73	Hearing cont'd.
9-26-73	Hearing cont'd. and adjd to Oct. 2, 1973
10-2-73	Hearing cont'd & concluded - Decision reserved.
10-2-73	Filed memo endorsed on order to show cause dtd 9-24-73 The matter is adj'd to 10:20 a.m. 10-11-73 and trial will be held at that time. So ordered Frankel, J.
10-16-73	Filed memorandum for counsel - A memorandum relating to the automobile search will be filed in the next day or so - Frankel, J.
10-18-73	R. JERMAIN - Filed affidvt. of G.A. Feffer, AUSA dtd. 10-18-73 for a writ of H/C
10-23-73	Filed supplemental bill of particulars.

DATE	PROCEEDINGS
10-23-73	EAPL SIMMS - Filed CIA appointment of Stuart Holzman Esq. 233 B'Way NYC 10007
10-24-73	L. CAPRA - Filed CIA authorization of ... Court Reporters
10-27-73	R. JERMAIN - Filed CIA authorization of ... Court Reporters
10-31-73	Filed Govt's exhibit 35251 Ordered sealed and to be placed with the clerk in his vault in cashiers office....Frankel, J.

10-18-73	L. CAPRA) L. GUARINO) S. DELLACAVA) - JURY TRIAL BEGUN Defts SIMMS, MESSINA and GARCIA severed from R. JERMAINE) trial, upon Govt's motion. Count 6 is dismissed as to all defts. G. HARRIS) A. MORRIS)
10-19-73	Trial cont'd.
10-23-73	Trial cont'd.
10-24-73	Trial cont'd.
10-25-73	Trial cont'd.
10-26-73	Trial cont'd.
10-29-73	Trial cont'd.
10-30-73	Trial cont'd.
10-31-73	Trial cont'd.
11-1-73	Filed one envelope Govt. Exhibit 3532A ordered sealed and placed in vault...Frankel, J.
11-9-73	Filed Court exhibit 1 ordered sealed and placed in vault...Frankel, J.
11-9-73	Filed order that U.S. Marshal deliver Herbert Spaulding before Judge Frankel on Nov. 12-73....Frankel, J. Mailed notice
11-12-73	Filed affdvt. of D. McAlevy in support of writ of habeas corpus.
11-14-73	Filed affirmation of L.J. Lavenson in support of a writ.
11-15-73	Filed order that U.S. Marshal deliver Thomas Lentini before Judge Frankel on 11-15-73.
11-15-73	GEORGE HARRIS - Filed affdvt. of L.B. Feld, AUSA in support of a Writ of H/C
11-1-73	TRIAL Cont'd.
11-2-73	Trial Cont'd.
11-5-73	Trial Cont'd.
11-7-73	Trial Cont'd.
11-8-73	Trial Cont'd.
11-9-73	Trial Cont'd.
11-10-73	Trial cont'd. Govt. Rest.
11-11-73	Trial cont'd.
11-12-73	Trial cont'd.
11-15-73	Trial cont'd.
11-16-73	Trial cont'd.
11-17-73	Trial cont'd. Jury starts deliberation
11-20-73	Trial cont'd. Jury resumes deliberation
11-21-73	Trial cont'd. Jury returns verdict as follows----CAPRA, GUARINO, DELLACAVA and JERMAIN found GUILTY on all counts 1, 2, 3 & 4 & 5 cont'd. on present bail condition until 10 a.m. Nov. 23, 1973 at which time they are to surrender to U.S. Marshal in the Court...DEFTS HARRIS & MORRIS found guilty on Count 1. P.S.I. ordered on all defts Sent. date in Jan. 3, 1974...Frankel, J.

DATE	PROCEEDINGS	Date Order Judgment No
-27-73	DELLA CAVA - Filed opinion #40047 The motion to suppress is denied...no ordered. Frankel, J.... Mailed notice.	
-23-73	JOHN CAPRA) STEVEN DELLA CAVA) LEOLUCA MARINO) ROBERT JERMAIN) Deft's surrendered to custody of U.S. Marshal pending sentence.	
-73	Filed opinion # 40082 ***examining the conduct of the legal and police officials following Dec. 12, 72 the court concludes that it was reasonable and outlary is not warranted.***the motion to suppress evidence from the Diane's Bar interceptions was denied.....Frankel, J.	
-5-73	Filed opinion #40093 Supplementing the court's memorandum of Nov. 27-73***having in mind the familiar rule that an agency's transgression of its own regulations may constitute a deprivation of due process***FRANKEL, J. - /copy of	
-18-73	Filed letter dated 12-17-73 to Judge Marvin E. Frankel from Paul J. Curran, U.S. Atty with memoradums attached.	
-26-73	Filed Mailed original CJA copy 1 to the A.O. Wash.D.C. for payment of Reporters Frankel, J.	
-27-73	Filed memorandum opinion #40150 ****as the motion in this case was originally presented upon affidvts, the claim of a possessory interest by the movants J. Capra, L. Guarino and S. Della Cava was in general and conclusory terms:**** This was not an intrusion initiated by law enforcement officers with the specific intent of discovering evidence of a crime. In short the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here.....Frankel, J.....Mailed notice to atty's.	
-74	L. GUARINO - Filed affdvt. of deft. in response to the information filed by the Govt. pursuant to 21 U.S.C. Sec. 851	
-74	JOHN CAPRA - Filed Judgment (474, 0833) Atty. Barry I. Slotnick, present. The deft is committed for a period of FIFTEEN (15) YEARS on each of counts 1, 2, 3, and 5 to run concurrently with each other. THREE (3) YEARS on count 4 to run consecutively with sentence imposed on counts 1, 2, 3 and 5. On counts 1, 4, and 5, pursuant to the provisions of Section 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of SIX (6) YEARS in addition to said term of imprisonment....Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000....The Court recommends that the deft be confined at Federal Detention Center, West St., N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....Docketed 1-7-74 NO BAIL SET. REMANDED.	

(SEE PAGE 8)

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DATE	PROCEEDINGS	Date Ord Judgment
3-74	LEOLUCA GUARINO-Filed Judgment (#17037) Atty. Dennis D.S. McAlvey present. The deft is committed for imprisonment for a period of FIFTEEN (15) YEARS on each of counts 1,2,3, and 5 to run concurrently with each other. THREE (3) YEARS on count 4 to run consecutively with sentence imposed on counts 1,2,3 and 5. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Ti.21, U.S.Code, deft is placed on SPECIAL PAROLE for a period of SIX (6) YEARS in addition to said term of imprisonment. Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000.. The Court recommends that the deft be confined at Federal Detention Center, West.,N.Y. pending appeal if overtaxed facilities make that possible. WNO BAIL. REMANDED. FRANKEL,J.....Docketed 1-7-74....	
1-3-74	STEPHEN DELIACAVA- Filed Judgment. Atty. Lawrence Feitell, present. The deft is committed for imprisonment for a period of FIFTEEN (15) YEARS on each of counts 1,2,3, 4, and 5 to run concurrently with each other. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Ti. 21 U.S.CODE deft. is placed on Special PAROLE for a period of SIX (6) YEARS IN ADDITION TO said term of imprisonment. Court recommends that the deft be confined at Federal Detention Center, West Street, New York, N.Y. pending appeal if overtaxed facilities make that possible. FRANKEL, J..... DOCKETED 1-7-74 No bail. Remanded.	
1-3-74	ROBERT JERMAIN-Filed Judgment(Atty.Leonard J.Levenson,present)The deft is committed for imprisonment for a period of TWELVE(12)YEARS on each of counts 1,2,3,4 and 5 to run concurrently with each other. On counts 1, 4 and 5,pursuant to the provisions of Section 841 of Ti.21, U.S.Code, deft is placed on Special Parole for a period of SIX(6)YEARS in addition to said term of imprisonment...The Court recommends that the deft. be confined at Federal Detention Center, West St.N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....docketed 1-7-74 Left is remanded.....	
1-3-74	ALAN MORRIS- FILED JUDGMENT. ATTY. JOSEPH I. STONE, PRESENT.The deft is committed for imprisonment, for a period of EIGHT (8) YEARS. Sentence to run conc with the sentence imposed in the U.S.D.C. EAST DIST OF MICHIGAN on 8-15-73, Docket #15685 The Court recommends that the deft be confined at Federal Detention Center, West Street New York, N.Y. pending appeal if overtaxed facilities make that possible, Frankel, J. Docketed: 1-7-74 Deft is Remanded....	
1-8-74	Filed memorandum #40185 on pretrial publicity...The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities...Defts have moved to dismiss the indictment or have convictions set aside...This court subject to wiser opinions from above deems such relief excessive and unjustifiable.*****Frankel, J...	
1-9-74	ALAN MORRIS - Filed notice of appeal..Mailed copy to Alan Morris Fed.Detention Headquarters 427 West St. NYC & U.S.Atty. S.D.N.Y. Joseph I.Stone,Esq. 277 B'Way NYC.....Appeal allowed in forma pauperis...Frankel,J. Entered on Docket 1-9-74..	
1-9-74	ROBERT JERMAIN - Filed notice of appeal..Mailed copy to Leonard J.Levenson,Esq. 11 Park Pl.NYC & U.S.Atty.S.D.N.Y.....Leave to appeal in forma pauperis granted on 1-8-74..Frankel,J. Entered on docket 1-9-74	

PROCEEDINGS

- 74 STEPHEN DELLACAVA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Stephen Dellacava 427 West. St. NYC Ent. on docket 1-10-74..
- 1-74 LUCIA GUARINO - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft at Fed. Detention Headquarters West. St. N.Y. Ent. on docket 1-11-74..
- 74 JOHN CAPRA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft J. Capra 15 Northwood Circle New Rochelle, N.Y. Ent. on docket 1-11-74....
- 1-74 Filed Govt's memorandum of law in opposition to motions of CAPRA, GUARINO and DELLACAVA.
- 1-74 Filed deft's memorandum on motion to suppress the Toledo Search Product.
- 1-74 Filed Govt's memorandum of law in opposition to motion to suppress.
- 11-74 GEORGE HARRIS - Filed notice of appeal from final judgment. Mailed copies to U.S. Atty. G. Harris Fed. House of Detention NYC D. Blackstone 335 21 Way NYC..... Memo endorsed Leave to file notice of appeal in forma pauperis is granted.... Frankel, J. Ent. on docket 1-11-74...
- 11-74 GEORGE HARRIS - Filed Judgment (David Blackstone, atty. present) the deft is committed for imprisonment for a period of THIRTEEN YEARS. Sentence to run concurrently with sentence imposed under indictment 73Cr. 392.... Pursuant to the provisions of section 841 of Ti. 21, U.S.C., deft is placed on Special Parole for a period of FIVE YEARS in addition to said term of imprisonment.... Remanded. Frankel, J. docketed 1-15-74.....
- 15-74 Filed memorandum... In the judgments in this case, the court apprised of the proposed appeals and urged to make consultation with counsel as convenient as possible.... The Court will not go beyond the suggestions.... Frankel, J. w/n
- 16-74 S.D. CAVA Filed remand dated 11-23-73
- 16-74 R. JERMAIN Filed remand dated 11-23-73
- 16-74 S. CAPRA Filed remand dated 11-23-73
- 16-74 L. GUARINO Filed remand dated 11-23-73
- 16-74 L. GUARINO Filed commitment & entered return. Deft. delivered to F.D.H. ON 1-3-74
- 16-74 S. CAPRA Filed commitment & entered return. Deft. delivered to F.D.H. ON 1-3-74
- 16-74 R. JERMAIN Filed commitment & entered return. Deft. delivered to F.D.H. ON 1-3-74
- 16-74 S. DELLACAVA Filed commitment & entered return. Deft. delivered to F.D.H. ON 1-3-74
- 14-74 Filed transcript of record of proceedings, dated OCT. 16, 19, 23, 24, 25, 1973
- 14-74 Filed transcript of record of proceedings, dated OCT. 26, 29, 30, 31, 1973
- 14-74 Filed transcript of record of proceedings, dated NOV. 8, 9, 13, 1973
- 14-74 Filed transcript of record of proceedings, dated NOV. 14, 15, 16, 1973
- 14-74 Filed transcript of record of proceedings, dated NOV. 17, 20, 21, 1973
- 14-74 Filed transcript of record of proceedings, dated NOV. 1, 2, 5, 7, 1973
- 14-74 Filed transcript of record of proceedings, dated 1-3-74

DATE	PROCEEDINGS
30-74	Filed letter to Judge Frankel dated Dec. 12, 73 from the US Atty. Gen.
30-74	Filed Letter to Judge Frankel dated Dec. 17, 1973 from US Atty Gen. Carre
30-74	Filed letter to Judge Frankel dated Dec 22, 73, from L. J. Feltall, Esq.
30-74	Filed Letter to Judge Frankel dated Dec. 22, 1973 from E. J. Blotnick, Esq.
31-74	Filed notice to docket clerk that the record on appeal has been certified and transmitted to the U.S.C.A.
31-74	George Harris - Filed commitment & entered return D.C. on 1-11-74
1-23-74	ALAN MORRIS Filed commitment & entered return D.C. delivered to 7-1-1-74 on 1-3-74
2-21-74	Filed transcript of proceedings dated Sept 17-18/73
2-27-74	Filed transcript of proceedings dated Sept 18 - 21/73
2-27-74	Filed transcript of proceedings dated Sept 23-26/73, Oct 2/73
2-27-74	Filed notice that the supplemental record on appeal has been certified and transmitted to U.S.C.A.
3-1-74	GEORGE HARRIS - Mailed original CJA copy 1 to the A.C. Wash. D.C. for payment.
3-5-74	ALAN MORRIS - Filed affdvt. of J.I. Stone, Esq. dtd. 2-5-74 to Frankel, J.
3-11-74	JACK BROWN - Closed proceedings by 330a.m. 15 () () () In all other respects this case is still pending.
3-13-74	ALAN MORRIS - Mailed original CJA copy 1 to A.C. Wash. D.C. for payment. Frankel, J.
3-12-74	EARL SIMS) JOSEPH MESSINA) CARMELO GARCIA) ENTERED AND FILED NOLLE PROSEQUI. Frankel, J.
3-15-74	L. Guarino - Filed memorandum of law.
3-15-74	Filed affdvt. exhibit, appendix and memorandum with regard to the minimization hearing.
3-15-74	Filed Analysis of telephone conversations contained in defts exhibit 6.
3-15-74	Filed Govt's supplemental memorandum in opposition to motions to suppress.
3-15-74	Filed Govt's memo in opposition to motions of CAPRA, GUARINO and DELLACAVA.
3-15-74	Filed affdvt. of G.A. Feffer, AUSA dtd. 2-15-74
3-15-74	Filed memorandum of law (Preliminary statement)
3-15-74	Filed deft Dellacava's memorandum of law.
3-15-74	Filed deft's requests on voir dire.
3-15-74	Filed deft Robert Jermain request to charge
3-15-74	Filed deft Robert Jermain memorandum of law.

DATE	PROCEEDINGS
3-15-74	Filed Govt's memorandum of law in opposition to Dellacava's motion to suppress
3-15-74	Filed Govt's proposal for a pre-trial hearing on minimization.
3-15-74	L. GUARINO - Filed reply to Govt's proposal for pre-trial hearing on minimization
4-8-74	Designation of exhibits to be transmitted to the U.S.C.A. filed.
4-10-74	EARL SIMS - Mailed original GJA copy 1 to the A.O. for payment...Frankel, J.
4-9-74	Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
4-9-74	J. CAPRA) L. GUARINO) S.D. CAVA.) Filed affdvt. & notice of motion for a new trial.
5-30-74	1 Filed reply affdvt. to Govt's answering affdvt. in opposition to new trial.
5-3-74	Filed memorandum deft's Capra, Guarino & Della Cava seek a new trial.***The Court will hold the motion papers now on file. If and when the convictions are finally sustained and the mandate comes down, the movants may renew on the existing papers by filing a written statement.***Frankel, J.....Mailed notice.
5-20-74	ALAN MORRIS - Filed motion for correction of sentence.
7-24-74	ALAN MORRIS - Filed memorandum in support of said motion.
8-26-74	ALAN MORRIS - Filed supplemental brief for correction of sentence.
8-29-74	ALAN MORRIS - Filed memorandum. Mr. Morris argues with some ingenuity that his sojourn in Atlanta stamped him indelibly as a federal prisoner****the motion must be and it is denied....Frankel, J....
8-30-74	A. MORRIS - Filed affdvt of Gerald A. Feffer, AUSA dtd 7-2-74
9-30-74	A. MORRIS - Filed memorandum...the petitioner has applied for a certificate of probable cause****and it is denied....Frankel, J....Mailed notice
10-4-74	A. MORRIS - The court's memorandum of Sept. 30-74 is not squarely responsive to the question under rule 24 ****the court concludes that the appeal should not be permitted to proceed in forma pauperis.....Frankel, J....
10-9-74	Filed true copy of U.S.C.A. order with mandate attached. The judgments are affirmed in part and reversed in part in accordance with the opinion of this court. (Notice cards mailed to all atty's)
11-6-74	Earl Sims. et-al. Filed Transcript of Record of Proceedings dated 5-25-73
12-2-74	ALAN MORRIS - Filed motion for production of wiretap orders
12-16-74	ALAN MORRIS - Filed affdvt. of Lawrence S. Feld, AUSA DTD. 12-16-74
12-16-74	A. MORRIS - Filed memo endorsed on motion filed 12-2-74...The within motion appears to lack any sound basis in law or in fact. It is denied....Frankel, J.

DATE	PROCEEDINGS
1-30-75	JOHN CARUSO - Closed statitically because (X) defendant () co-defendant () witness In all other respects this case is still pending.
-11-75	Filed true copy of Supreme Court order that petition for writ of certiorari is denied.
-8-75	JOHN CAPRA... filed deft's affdvt. and Order to Show Cause for reduction of sentence... personal service on or before 7-8-75 by 11:00 a.m.... Ret. 7-11-75... FRANKEL, J.
-10-75	LEOLUCA GUARINO: Filed defts Affirmation and Order To Show Cause, why an order should not be made, Modifying the sentence of the deft by reducing the sentence of deft as imposed etc, as indicated rtble before Frankel, J. on 7-10-75. Frankel, J.
-10-75	STEVEN DELLACAVA. Filed defts Affirmation and Order To Show Cause why an order should not be made, modifying the sentence of the deft by reducing the sentence of deft as imposed, etc, as indicated, rtble before Frankel, J. on 7-10-75. Frankel, J.
-11-75	JOHN CAPRA.. filed Amended Judgment.. the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of FOURTEEN (14) YEARS on each of counts 2, 3 and 5 to run concurrently with each other... THREE (3) YEARS on count 4 to run concurrently with sentence imposed on counts 2, 3 and 5... On counts 4 and 5, pursuant to the provisions of Section 841 of Title 21, U.S. Code, deft. is placed on Special Parole for a period of SIX (6) YEARS in addition to said term on imprisonment.. Deft. is fined \$ 20,000 on count 2.. The court orders commitment to the custody of the Atty. General and recommends, that the Bureau of Prisons consider favorably if possible the application for deft's transf to Lewisburg where family visits, with their rehabilitative potential, would be more feasible.... Frankel, J. Ent. on 7-29-75.
-11-75	LEOLUCA GUARINO.. filed Amended Judgment... the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of FOURTEEN (14) YEARS on each of counts 2, 3, and 5 to run concurrently with each other. THREE (3) YEARS on Count 4 to run concurrently with sentence imposed on counts 2, 3 and On counts 4 and 5, pursuant to the provisions of Section 841 of Title 21, U.S. Code, def. is placed on Special Parole for a period of SIX (6) YEARS in addition to said term of imprisonment.. Deft. is fined \$ 20,000. on count 2... The court orders commitme to the custody of the Atty. General and recommends, as in the case of co-deft. John Capra, that application for transfer to Lewisburg, if one is made, be given favorable consideration if possible... Frankel, J. Ent. 7-29-75
-11-75	STEPHEN DELLACAVA - FILED AMENDED JUDGMENT..the deft. is committed for imprisonment for a period of TWELVE YEARS on each of cts. 2, 3, 4, and 5 to run concurrently with each other. On cts. 4 and 5, pursuant to the provisions of Sec. 841 of Ti. 21, U.S. Code, deft is placed on SPECIAL PAROLE for a period of SIX YEARS in addition to said term of imprisonment. The Court recommends, as in the case of co-deft John Capra, that an application for transfer to Lewisburg, if one is made, be given favorable consideration if possible.... Frankel, J. Ent. 7-29-75-----

DATE

PROCEEDINGS

11-75 ROBERT JERMAIN - FILED AMENDED JUDGMENT...The deft is committed for imprisonment for a period of TEN YEARS on each of Cts. 1, 2, 3, 4 and 5 to run concurrently with each other. On Cts. 1, 4, and 5 pursuant to the provisions of Sec. 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of SIX YEARS in addition to said term of imprisonment...The Court recommends, in the case of codefendant John Capra, that an application for transfer to Lewisburgh, if one is made be given favorable consideration if possible.....Frankel, J.Ent. 7-29-75-----

11-75 GEORGE HARRIS - FILED AMENDED JUDGMENT...The deft is committed for imprisonment for a period of TEN YEARS...Sentence to run concurrently with sentence imposed under indictment 73Cr. 392. Pursuant to the provisions of Sec. 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of FIVE YEARS in addition to said term of imprisonment....Frankel, J.Ent. 7-29-75---

13-75 JACK BROWN - Entered and Filed Nolle Prosequi.....Frankel, J.

13-75 S. CAPRA - ~~Filed commitment & entered return, 11-11-75~~ 2 COPIES MAILED TO U.S.P. ATLANTA, GA.

13-75 L. GUARINO - ~~Filed commitment & entered return, 11-11-75~~ 2 COPIES MAILED TO U.S.P. ATLANTA, GA.

13-75 G. HARRIS - ~~Filed commitment & entered return, 11-11-75~~ 2 COPIES MAILED TO U.S.P. ATLANTA, GA.

13-75 R. JERMAIN - ~~Filed commitment & entered return, 11-11-75~~ 2 COPIES MAILED TO U.S.P. ATLANTA, GA.

13-75 S. DELLACAVA - ~~Filed commitment & entered return, 11-11-75~~ 2 COPIES MAILED TO U.S.P. ATLANTA, GA.

14-75 Filed transcript of record of proceedings dated 11-11-75

1-20-75 JOHN CAPRA,)
LEOLUCA GRARINO,)
STEVEN DELLACAVA,) - Filed affdvt and notice of motion for an order granting new trial, to dismiss the indictment and for a hearing.

1-21-75 CAPRA + GUARINO + DELLACAVA - Filed Deft's Memorandum of Law.

01-20-76 JOHN CAPRA, LEOLUCA GUARINO, STEVEN DELLACAVA - Filed MEMO DECISION #43755 in ref. to Defts. notice of motion for an order granting new trial, to dismiss the indictment, etc., filed 11-20-75. The motion in 73 CR. 460 is DENIED. the petition in 75 CIV. 6183 is dismissed. IT IS SO ORDERED--FRANKEL, J. - (m/n's)

02-02-76 CAPRA + GUARINO + DELLACAVA - Filed Deft's Notice of Appeal to the U.S.C.A., 2nd circuit, from the judgment entered on 01-20-76. (m/n's)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter	:	EXTENSION OF
of	:	EAVESDROPPING
	:	WARRANT

the placement and employment of electronic
eavesdropping devices inside the ground floor :
of the premises 1023 Havermeyer Avenue, Bronx. :
New York, to overhear, intercept and record the :
conversations of STEPHEN DELIA CAVA, JOHN CARRA, :
MICHAEL CAPRA, LEOLOCA GUARINO, and LARRY :
FILIPPONE, with each other and with their co- :
conspirators, accomplices, agents, suppliers, :
deliverers and customers, pertaining to illegal :
traffic in narcotics. :

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It appearing from the affidavit of Frank S. Fogan, District Attorney of the County of New York, and the accompanying affidavit of Detective George Eaton, of the Special Investigations Unit, Narcotics Division, Organized Crime Control Bureau, N.Y. City Police said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part thereof, that the installation required for the execution of the above-captioned order, issued by the Court on September 11, 1972, completed on September 19, 1972, and that the 30-day period allowed by said order therefore runs from September 18, 1972 to and including the 17th of October, 1972; and that there is probable cause to believe that evidence of the crimes of criminal possession of a dangerous drug as a felony and criminal sale of a dangerous drug as a felony, in violation of Article 220 of the Penal Law of the State of New York, may continue to be obtained by overhearing, intercepting and recording

the conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO and LENNY FILIPPONE, and with their co-conspirators with each other/

accomplices, agents, suppliers, deliverers, and customers pertaining to illegal traffic in narcotics, inside the ground floor of premises 1025 Havermeyer Avenue, Bronx, New York, and the Court being satisfied that comperable evidence for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer acting under his direction, is hereby authorized and empowered to continue to utilize within said premises electronic eavesdropping devices to overhear, intercept and record the conversations within said premises of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE with each other and with their co-conspirators accomplices, agents, suppliers, deliverers and customers pertaining to illegal traffic in narcotics relating to the above-mentioned crimes; and it is further

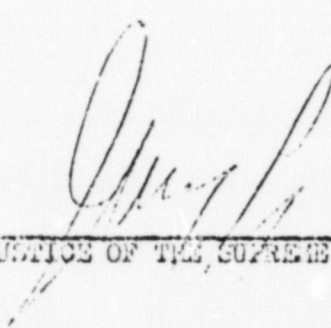
ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence nor the presence of electronic eavesdropping devices inside said premises, nor the use of its lines and facilities in the execution of this Order to any person, including but not limited to the owners, lessors, lessees, tenants, residents, users or occupiers, or subscribers of said premises, facilities or equipment, whether or not the said owners, lessors, lessees, tenants, users, occupiers or subscribers of said premises, facilities or lines request that said premises, facilities or lines be checked for the existence of said electronic eavesdropping equipment; and it is further

ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any communications of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEDIACA GUARINO, or LARRY FILIPPONE which are otherwise privileged and it

ORDERED, that this order shall be executed as soon as practicable and shall be effective from the 18th day of October, 1972, at any hour of the day or night, and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have first been obtained, but in no event to exceed thirty (30) days from said effective date, i.e. November 16, 1972.

Dated: New York, New York

October, 18 1972. 1:45



JUSTICE OF THE SUPREME COURT

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the placement and employment of electronic eavesdropping devices inside the ground floor of the premises 1023 Havermeyer Avenue, Bronx, New York, to overhear, intercept and record the conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEO LUCA GUARINO, and LEO NY FILIPPONE, with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers, pertaining to illegal traffic in narcotics.

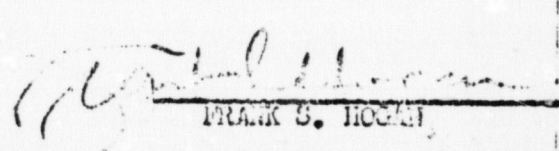
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4. In my opinion, there are no alternative investigative techniques or procedures that could be used to acquire the essential evidence necessary to prosecute successfully the violators of the crimes

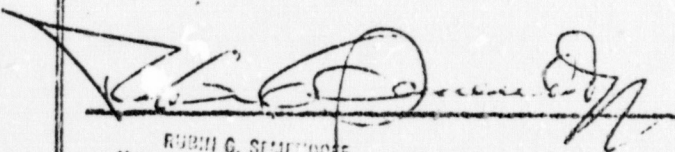
described therein. I believe that the nature and scope of the criminal activities involved is of sufficient importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that the annexed extension of this eavesdropping warrant be issued and made effective from the effective date, October / 8, 1972, until and including the / 16th of November, 1972.

No previous application for the relief sought herein has been made to any other court or justice.


FRANK S. HOGAN

Sworn to before me this
18th day of October, 1972


RUBIN G. SEMETICH
Notary Public, State of New York
No. 03-8018725
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1974

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<p style="text-align: center;">In the Matter of</p> <p>the placement and employment of electronic eavesdropping devices inside the ground floor of the premises 1023 Havermeier Avenue, Bronx, New York, to overhear, intercept and record the conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LARRY FILIPPONE, with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers, and customers, pertaining to illegal traffic in narcotics.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>AFFIDAVIT IN SUPPORT OF RENEWAL OF EAVESDROPPING WARRANT</p>
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STATE OF NEW YORK)	
)	ss.:
COUNTY OF NEW YORK)	

GEORGE EATON, being duly sworn, deposes and says:

1. I am a detective in the New York City Police Department, assigned to the Special Investigation Unit of the Narcotics Division, Organized Crime Control Bureau, and I am presently conducting an investigation to determine whether certain crimes of Criminally Possessing a Dangerous Drug as a Felony and Criminally Stalling a Dangerous Drug as a Felony, both of which are crimes in violation of Article 220 of the Penal Law and are punishable by imprisonment for more than one year, have been and are being committed by STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LARRY FILIPPONE, with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers, and customers in and about the County and City of New York.

Police Department

2. I have been a member of the New York City/

for approximately nine years. I have been assigned to the Narcotics Division for approximately one year. I have participated in more than one hundred narcotics arrests and in investigations involving several previous eavesdropping warrants.

3. This affidavit is submitted in support of New York County District Attorney Frank S. Hogan's application for an extension of the above-captioned eavesdropping warrant, which was issued by the Honorable Irving Lang, Justice, Supreme Court of the State of New York, on September 11, 1972.

4. I am informed by Detective Thomas Ward, S.I.U.-O.C.C.B., N.Y.C.P.D. that preliminary difficulties were encountered in installing the "bugs" and making them operational; and that we were not able to intercept and record conversations until approximately 1 p.m. on September 19, 1972.

During the first weeks of operation, an additional problem arose: whenever the named subjects entered the premises and conducted discussions, the television set in the club would be turned on, with the volume turned quite high, making it difficult at times to ascertain who was saying what to whom. However, improvements have since been made on our equipment, and this problem has been largely overcome.

5. During the past weeks, evidence has been obtained via the eavesdropping which indicates that DELLA CAVA, GUARINO, JOHN CAPRA, and others engaged in narcotics sales in the past, are continuing to do so in the present and hope to do so in the future.

However, the conversations overheard also demonstrate that they have had difficulties obtaining narcotics in the quantity and of the quality which they are accustomed to handle. "There's no dope," DELLA CAVA complained at one point, and GUARINO expressed concern about "the headlines if you're handling done today."

Nor is the scarcity of narcotics restricted to DELLA CAVA, GUARINO, the CAPRA's and their associates. There is a "panic in the streets" throughout the city and the east coast. I have been told as much by other narcotics investigators who agree that drugs are currently very scarce, and the price for narcotics is skyrocketing. John Ingersoll, regional director of the Federal Bureau of Narcotics and Dangerous Drugs, has also commented publicly about the remarkable degree and duration of the "panic" -- a panic caused, in his opinion, by the dramatic increase in law enforcement activities and investigations in the narcotics field.

The narcotics traffickers are apparently "feeling the heat."

This is not to say that our subjects and their associates are dropping out of the narcotics business; far from it. They are reaching out to as many sources as possible for drugs; they are trying to placate their customers. But the evidence gathered during the past month demonstrates that they realize that they will have to be satisfied with small transactions here and there until the "panic" eases and the large quantities of narcotics become available to them again.

6. On October 2, 1972, a conversation was overheard which in my opinion strongly connects GUARINO, DELLA CAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in the Toledo, Ohio, in November, 1971. The background of the Toledo seizure has been told to me by a detective who worked on that investigation and is now working on this one.

6A. I am informed by Detective James Nauwens of the following:

I am a detective in the N.Y.C.P.D. currently assigned to UCCB and the ODALE. From October, 1970 to September, 1972 I was a participant in an investigation, while assigned to the New York Joint Task Force, which investigated the activities of JOSEPH "JOEY" RAMOS, ROBERT MCFADDEN, ADAM MORRIS, also known as "UNDERWORLD", HAROLD MCFADDEN and others.

"This investigation culminated in the arrests of RAMOS, MORRIS, MCFADDEN and one other for possession of approximately 6 kilograms of heroin and 1 kilogram of cocaine in the Union (train) Station, ^{in Toledo, Ohio,} in November, 1971.

"The evidence in that case involved, in part, photographs which I had taken showing RAMOS, MORRIS, MCFADDEN and others seated together at Madison Square Garden at the MUHAMMAD ALI-OSCAR BONAVENNA fight in December, 1970.

"I am informed by MEL RESNICK, of the Lucas County, Ohio Prosecutors Office, that the testimony at the trials of MORRIS, MCFADDEN, and RAMOS established the following:

"In November, 1971, RAMOS went to the Union Station and checked a suitcase. Shortly thereafter he got into a discussion with a cab dispatcher at the station and told the dispatcher that his aunt was sick and he had to return to New York.

"A few days later MORRIS, MCFADDEN and one other went to the train station and retrieved the suitcase; at this point they were arrested.

The suitcase contained approximately 6 kilograms of heroin and 1 kilogram of cocaine.

"In August of 1972 I testified in Toledo at the trial of MCFADDEN, MORRIS and the other individual. They were all convicted of possession of the narcotics and related crimes.

"In the last week of September, 1972, I testified in Toledo at the trial of JOAQUIN "JOHNNY" RAMOS. Part of my testimony concerned the Madison Square Garden photograph. RAMOS too, was convicted of possession of narcotics; the trial lasted about ten days.

"I am informed by Mr. Resnick that the first witness he called in the RAMOS trial was the gentleman with whom RAMOS had checked the suitcase in the Union Station, Toledo. I am further/ informed by Mr. Resnick that Union Station is an old ancient-looking building and is not at all a busy station; relatively few trains stop there, relatively few passengers utilize it."

6B. On October 2, 1974, between 9:30 p.m. and 11:15 p.m., conversations were overheard and recorded between STEPHEN DELLA CAVA, LEO LUCA GUARINO, JOHN CAPRA and an unknown male. These conversations included:

LEO: The fucking agent out there---inaudible---

JOHN: They want him bad, they want him bad, there's a Grand Jury on him, they're going to bring Johnny down, they're going to bring the witness down cause of the insurance case. (inaudible)
The three agents from New York, - - - takes ten days to work the whole trial, the fucking courts from out there---and the department out there, ten days in the fucking courtroom. He says

the first witness, they're going to call was the guy from the bag---inaudible---as soon as he got on the stand---inaudible---the guy was convicted. (Inaudible) they let in more fucking shit, they let in the cases, they let in the pictures from Madison Square Garden. They only had six things, six fucking, ah, six pieces of evidence, four were to connect, and the two they had for the conspiracy with the pictures and the tickets, which is no where near enough, because in the picture you don't see them talking to each other. You just see them sitting there, that's not enough for conspiracy. ... He's got to be guilty now what thing---inaudible---you know he gave the guy his right name, you know he told the guy his fucking name, gave it to him. The guy, the guy asked him for change, he told the guy to make reservations for him on the flight and every fucking thing---Mike believes the guy is the biggest fucking moron in the world. He talked to the guy for a half an hour. Talked to him, got to go to New York, my aunts died---inaudible---(FOR ABOUT TWO HOURS) There's no way they can connect Bobby with the photographs---inaudible---who the fuck was it---Bobby---inaudible---what kind of a move, do, do you use then he gave his right fucking name Fuck it, Johnny comes over to me---with this fucking place. It looks like 1885, did you ever see the fucking train stops there have---that's the fucking place, that's the place.

... about six people a week.

LEO: Then what the fuck did he have to go to Toledo for? Do you know what's with this guy.

STEVE: No. We told him to go

LEO: We didn't tell him to go to Toledo

STEVE: Yes we did, yes we did

JOHN: The next town, we told him to go there

STEVE: Right

JOHN: Tell him to go, he's supposed to go there, well who the fuck-- Toledo sounded big to us

STEVE: I thought it was a big town. What the fuck did we know, we didn't know that

JOHN The guy ain't got no fucking brains.

MALE It's our fault Iec, You what it boils down to, we gave a guy a fucking, ah chance and he wasn't,, ah fucking smart enough. If that was you or me, somebody else, we would of -- inaudible --

JOHN This guys main thought was getting it, dropping it and running away.

6. I am informed by Detective Nauwens of the following:

"It is my opinion that this conversation, was about the RAMOS-MCSPADDEN-MORRIS case, and particularly the RAMOS trial.

"This opinion is based upon the following factors:

1. RAMOS was convicted in the last week in September. This conversation occurred on October 2nd.

2. CAPRA's source of information about the trial they are discussing is "Mike"---probably, in my opinion, Michael Santangelo.

(Mr. Santangelo has represented DELLA CAVA and GUARINO in the past.)

3. The trial lasted roughly ten days.

4. The first People's witness was "the guy from the bag"--- the man with whom RAMOS checked the suitcase.

5. I testified about the Madison Square Garden photographs, which were introduced into evidence.

6. RAMOS spoke to the cab dispatcher at length, mentioning that he had to go back to New York because of a sick relative.

7. "BOBEY" JETZAIN was in the photographs which I took; but I did not testify as to who he was, since he was not a party to either of the trials. (There's no way they can connect Bobby with the photographs" may be an assumption on CAPRA's part that because we didn't, we can't.)

8. The Union Station is an ancient building ("looks like 1865"), and is not heavily used ("nobody, nobody there, the fucking train takes about six people a week").

9. DELLA CAVA, CAPRA, and GUARINO all make it clear they are discussing the train station in, and a trial which has just occurred in, TOLEDO."

6D. I share Detective Nauwens', opinion.

Considering that DELLA CAVA stated, "HE TOLD HIM TO GO" (Emphasis added); that CAPRA stated, "The next town, we told him to go there; and that the UNKNOWN MALE stated, "We gave a guy a...chance and he wasn't...smart enough,"

DELLA CAVA, CAPRA, the UNKNOWN MALE, and GUARINO have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine, and of conspiracy to commit those crimes.

7. Later in the evening of October 2, 1972, a conversation between JOHN CAPRA, STEPHEN DELLA CAVA, LEOLUCA GUARINO, and an UNKNOWN MALE was intercepted at about 11:05 p.m. which included:

UNKNOWN MALE	Nobody wanted it so we asked 15 for it. We could have did fifty more if we had it.
GUARINO	Jeeze why don't you get me 42. I got a guy a guy that could -- I got a guy that could take 54
UNKNOWN MALE	This is it, this is it. This is better than work
CAPRA	This is for junkies only though Leo so you can't have it.

Given the scarcity of narcotics discussed in paragraph 5, above, this conversation demonstrates, in my opinion, that someone with a sizeable quantity of narcotics is in a position to command extremely high prices.

Thus when the UNKNOWN MALE said "Nobody wanted it, so we asked fifteen for it. We could have did fifty more if we had it," he was saying that he was able to sell narcotics at \$15,000 per half-kilogram--- an extremely high price --- and could have sold an additional fifty half-kilograms, at the same price, if he had had the narcotics available.

GUARINO agreed: "... why don't you get me 42. I got a guy that... could take 54."

Prices are so high now that "this is better than work," according to the unknown male, even though, as CAPRA notes, the narcotics is of relatively low quality: "This is for junkies only, though..."

A few seconds later, the conversation included:

DELLA CAVA ---There's no dope---100 million dollars---

GUARINO That's sheer fucking garbage. --can-see the headlines if you're handling dope today---

DELLA CAVA *They got Turkey to stop! they got 2,000 agents. he's stopping the Portuguese, he's spent 4 million-400 hundred million dollars this year in order to stop the junk that's why we need Nixon for President. This is the fucking--- apologizing this is gonna be his biggest attack the fucking ah-plague, it's junk he's got them lots of records to back him up.*

GUARINO what do you want me to do, take on "Big Mo"

DELLA CAVA and GUARINO are here expressing certain political opinions, crediting the Nixon administration with reducing the flow of narcotics into the United States --- although from their point of view, "crediting" may not be an appropriate term to use. GUARINO comments plaintively, "What do you want me to do --- take on "Big Mo?" --- which may have been a reference, for example, to the U.S. Missouri, and by analogy, to the United States government.

8. Several of the discussions intercepted involved JOHN "JACK" BROWN.

The relationship between DELLA CAVA, GUARINO and BROWN has been discussed at length in previous affidavits;

8A. December, 1971 thru February, 1972 -- See paragraph 7 of my affidavit of 6/9/72.

8B. June, 1972 -- See paragraphs 7B through 7D of my affidavit of July 12, 1972.

8C. July, 1972 -- See paragraph 6C of my affidavit of August 15, 1972.

8D. On September 13, 1972, BROWN was arrested by Patrolman Lamendola, New York City Police Department, on a charge of possession of four loaded guns (265.05); among other things.

8E. On 9/19, at about 8:30 p.m. DELLA CAVA made a phone call from this air conditioning store to an individual tentatively identified as "NTCKY". This conversation included:

DELLA CAVA

"...you know that guy?... my friend, the west side guy... Well, he's got to see you. ... could you make it for Sunday morning?

"IZZO"

.... Yeah, I think so."

DELLA CAVA and "NICKY" then agreed that "IZZO" would meet DELLA at about 12:30 the next day so DELLA CAVA would "let you know where to go."

The number DELLA CAVA dialed to speak to "IZZO" was 516-437-3415. According to the N.Y. Telephone Company, this number is registered to NICOLA IZZO, 873 Court Row, Franklin Square, Long Island.

8F. On 9/19/72, at about 11:15 p.m. a conversation between DELLA CAVA, GUARINO and JOHN CAPR was overheard at 1023 Havermeyer Avenue. As discussed in paragraph 4, above it was difficult to make out some of what was being said. However, the following was heard:

GUARINO

...Jack's a friend of mine. I swear to God, this fucking Jack, I'll go up against anybody almost for him.

In the context of the conversation and previous dialings, "JACK" was in my opinion a reference to BROWN.

8G. I am informed by Special Agent Brent Eaton, F.B.N.D.D., of the following:

On the morning of 9/20 he observed a Male, White, about 5'7", about 180 pounds, wearing black glasses, leave 873 Court Row, Franklin Square, L.I. and enter a 1968 Chevrolet, registered to NICOLA IZZO, at 873 Court Row, Franklin Square, L.I. This male drove to the Grand Central Parkway to the Lathamville Airport area, pulled off the parkway, and then lay down on the front seat of the car for about five minutes. Agent Eaton was aware of detecting a tail. The male then drove to 2036 Second Avenue, where he met with DELLA CAVA.

8H. I am informed by Sgt. Bernard Gillespie, S.I.U. - O.C.C.B.- New York City Police Department of the following:

At about 11 a.m. on Sunday, September 24, 1972 this male left 873 Court Row and drove to Manhattan -- again taking his five-minute "tail check" near LaGuardia. He then drove to the vicinity of 180 West End Avenue, parked, and entered 180 West End Avenue; Detective Michael DiSalvatore interviewed a civilian who told Det. DiSalvatore that "NICKY" entered apartment 20F -- BROWN's apartment.

A few minutes later "NICKY" and BROWN left 180 West End Ave. together and drove to the vicinity of 346 West 56th Street and entered that building.

Sgt. Gillespie subsequently arrested BROWN in possession of a loaded .38 calibre revolver (reported stolen from Danbury, Conn.) and \$4,000.00 on his person and a bag he had been carrying.

Subsequent investigation led to apartment 4D, 346 West 56th Street, for which BROWN had the keys, and which BROWN told Sgt. Gillespie was an apartment he was "visiting." A search of that apartment revealed \$35,579 in cash, approximately four ounces of cocaine, traces of heroin on various cutting implements, and about seventy pounds of mixing agents. Also recovered from the apartment were an additional 8 rifles, hand guns, and pen guns, a silencer, and ammunition for each, as well as evidence of other crimes.

8I. I am informed by Sgt. Gillespie of the following:

On September 24, 1972, BROWN was observed in conversation with JAMES BROWN inside Steve's Air Conditioning in conversation with BILLA GARY. JAMES BROWN was with another female who had an apparently

full shopping bag with her. The two females then took a cab to 180 West End Avenue."

8J. On October 4, 1972, during the evening, a conversation was overheard between JOHN CAPRA, GUARINO, DELLA CAVA and a male. This conversation included:

CAPRA	Hey Beans! How much is here?
DELLA CAVA	The guy says -- 20.
CAPRA	There's 18
DELLA CAVA	He says-20 like that--but, I'm not sure whether he said 18. I thought maybe he says 18--They ah 20 he gave me 18 there's 20 --there's 18 there. I didn't get nothing Ah little ah little something to help ah--
CAPRA	Do you wanna to wait will we get back what we paid!
MALE	INAUDIBLE
DELLA CAVA	Ah- inaudible because he just has his hands we gotta do the right thing--inaudible--last word \$18,000.
GUARINO	Nineteen thousand!?!--18 thousand a pound you gotta be crazy
MALE	INAUDIBLE
DELLA CAVA	He could be talking to the Fed's they gotta think he's crazy too-ha ha

In my opinion, this conversation relates to a narcotics transaction from GUARINO, DELLA CAVA, et al, to BROWN--probably subsequent to his arrest of September 24, 1972 possibly given to BROWN via the lady who was with Mrs. Brown on September 29 (paragraph 6I).

DELLA CAVA let BROWN have "a pound"--probably of heroin--for \$18,000.

(Because of the "pound" referred to in paragraph 5, above, the price of

CAPRA are annoyed
CAVA only let \$18,000 and not \$20,000 for the pound, and DELLA CAVA is

obviously defensive about the deal. He reminds the others that "JACO" has "Hardships"--a reference, in my opinion, to JACO's most recent arrest and losses of cash--"He got to do the right thing..."

GUARINO still complains about the price, DELLA CAVA reminds them of another reason to help BROWN out: "He could be talking to the Feds..." In other words, keep BROWN happy; otherwise he may decide to turn informant.

9. On October 10, 1972 at approximately 5:30 p.m. a conversation was overheard at 1023 Havermeyer. The participants to this conversation were JOHN CAPRA; GUARINO; an unknown male; and LOUIS "GIGI" INGLESE. The following is the essence of that conversation; while it is not a word-for-word transcript, I prepared it after listening to the tape several times.

CAPRA	... come to New York, then take off for Chicago; had to go back to Europe instead of going to, say, Philadelphia or something.
INGLESE	You should of let it go.
GUARINO	It hadda go back,
INGLESE	He should have followed the plane and waited till it comes back.
GUARINO	Go back with it.
INGLESE	You mean when he went to get the stuff? You mean the stuff was up there?
UNKNOWN	Yeah
CAPRA	The guy was afraid to let the plane to back to Europe.

UNKNOWN

That's true

CAPRA

The plane came to New York, right, he got off the plane, you know, the same plane, somebody else gets on, takes the fucking thing right off. New Orleans, or Chicago, walk out with it, not problems, no nothing.

... ..

... ..
... .. that any the fucking plane was a carrier aircraft and rerouted back to France, the fucking junk-off got scared, and he says "Go get it"--
(inaudible.)

UNKNOWN:

Well, you don't know

(inaudible)

CAPRA:

It costs me a hundred dollars, a hundred dollars

...

In my opinion, they were discussing an importation of narcotics which aborted.

Smugglers have been known in the past to use multi-city international flights as one method of bringing narcotics into the country. At the flight's point of origin, a passenger or airline employee brings a quantity of narcotics onto the plane with them and hides it somewhere on the plane (e.g. the men's room). When the plane arrives in New York City, the passengers and their belongings are subject to a customs search, but the planes themselves are not searched.

The passenger leaves the plane; but a co-conspirator of the smuggler gets on the plane and flies on to its next destination --

Chicago, New Orleans, Philadelphia or whatever. During this flight he removes the narcotics from its hiding place and departs the plane with it, free of any customs search.

The above conversation sounds to me like CAPRA is discussing just such an arrangement, which misfired when the second leg of the flight was cancelled and the plane had to return to France--with "the stuff" still "up there." They went on to discuss an alternative method of bringing the "package" in: Having it hidden in a car in Italy and shipping the car to the United States. They then discussed immigration. This is an operation which they appear to be planning in the near future.

10. On October 13, 1972, between 10:50 p.m. and 11:25 p.m., a conversation between DONALD CAPRA, GUARINO and another person was overheard at 1023 Havenmeyer Avenue. Much of the conversation involved GUARINO's various ailments, and medication he takes for them--seconals, barbiturates, hangover remedies. CAPRA teasingly referring to GUARINO, says, "This fucking drain would take junk and you know it." (i.e. GUARINO takes everything else; he would take heroin, too). GUARINO replies, "Kid, there's no junk to take"---(i.e. no heroin available), and all laugh; CAPRA replies, "For me it's suddenly '73" (i.e. that is when they expect the "panic" to arise), and all laugh again.

11. It is clear from these conversations and activities that DELLA CAVA, GUARINO and JOHN CAPRA have had less than the normal quantities of narcotics to sell, but not for lack of trying. They have apparently sold at least two packages to JOHN BROWN (on September 24 and again sometime before the conversation of October 2, related in paragraph 7 above). They have attempted to purchase narcotics at \$15,000 for a half-kilo (paragraph 7); they have attempted to have narcotics flown in, and are now planning to have narcotics shipped in (paragraph 9). Nevertheless they are apparently resigned to operating under the current "panic" for a while yet. "For me it's suddenly '73," CAPRA replied).

12. While MICHAEL CAPRA and LARRY FILIPPO have not had much to say in the conversations above, they have been in the club with each other and with the three "senior partners" of the drug combine (DELLA CAVA, JOHN CAPRA, GUARINO) on a number of occasions. Since they are primarily "turners" and delivery men, and there has been little for them to deliver, they have not been too active; while they have been in the club frequently, their junior status apparently relegated them to a "be seen but not heard" role.

13. I respectfully submit that the information contained in this affidavit establishes probable cause to believe that MICHAEL DELLA CAVA, MICHAEL CAPRA, JOHN CAPRA, LINDA GUARINO and LARRY FILIPPO have been and are continuing to engage in the crimes of criminal possession of a dangerous drug as a felony and criminally selling a dangerous drug

as a felony, in violation of Article 220 of the Penal Law, both of which are crimes punishable by imprisonment for more than one year.

I further respectfully submit that the information contained herein establishes probable cause to believe that DELIA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE have other co-conspirators, accomplices, agents, suppliers, deliverers and customers in the commission of said crimes.

I further respectfully submit that the information contained herein establishes probable cause to believe that these five individuals and their co-conspirators, accomplices, agents, suppliers, deliverers and customers discuss, negotiate and transact narcotic purchases and sales inside the second floor of the premises of 1023 Havenmeyer Avenue, Bronx, New York.

I further respectfully submit that the information contained herein establishes probable cause to believe that the conversations of these five individuals with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers inside the premises will continue to constitute evidence of said crimes.

14: Authorization is therefore sought to continue to monitor, overhear and record the conversations of DELIA CAVA, GUARINO, FILIPPONE and JOHN and MICHAEL CAPRA inside 1023 Havenmeyer Avenue. The conversations to be overheard, specifically, are those of these named individuals with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers, pertaining to illegal traffic in narcotics.

The interception of such conversations is essential if STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and BENNY FILIPPONE and their co-conspirators, accomplices, agents, suppliers and customers are to be successfully prosecuted. It is only by the interception of such conversations that it will be possible to identify their co-conspirators, accomplices, agents, suppliers and customers; to learn when and where DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE will be meeting with these other individuals to conduct narcotics transactions, so that surveillance can be maintained on these meetings and transactions; most important to approach DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE and/or one or more of their co-conspirators, accomplices, in possession of narcotics and in the act of selling narcotics.

15. I am not in possession of any information which would indicate that any of the conversations sought to be intercepted and overheard may be expected to come within any privilege under any applicable rule of law.

16. This investigation has been ongoing since the latter part of September, 1971, and for the reasons stated above it has been

deemed appropriate to request the court to issue a warrant against Stephen Della Cava, JOHN and MICHAEL CAPRA

LEOLUCA GUARINO, BENNY FILIPPONE, and their co-conspirators, accomplices, agents, suppliers, customers and others through whom they have endeavored to engage in the sale of narcotics. Informant does not have any information as to the location of these individuals.

Under these circumstances, I respectfully request that an order in the annexed form be issued by the Court.

17. The evidence detailed in the above paragraphs indicates that it is not possible to predict with certainty what particular time of day the above-described conversations may take place.

It is therefore respectfully requested that the annexed eavesdropping warrant be effective for a period of thirty days from the effective date and at any time during the day or night.

It is further requested that this order for interception not automatically terminate when the above-described type of communication has first been obtained. Considering the continuing nature of the criminal activity involved herein, it is important that the interception of conversations not terminate after the first conversation concerning narcotic drugs has been intercepted.

To my knowledge, no previous application for the order requested herein has been made to any other Court or Justice.

Sworn to before me this

18th day of October, 1972

NARCOTICS DIVISION

DATE TUESDAY AUGUST 22 1972 REEL A 3365

PLANT 333 East 93 rd St LINE 831 9247

FROM 0700 TO DETS NAUWENS

<u>TIME</u>	<u>IN</u>	<u>OUT</u>
0807	Male	Info Opp
In male asks for number of St Barnabas Hospital		
0808	Male	Barnabas Hospital NP

0858	11 Rings	No Answer
0859	10 Rings	No answer
0921	9 Rings	No Answer
0924	8 Rings	No, answer
0935	10 Rings	No Answer
0943	35 Rings	No answer
0945	13 Rings	No answer
1000	6 Rings	No answer

*SOE
MESSINA*

1001	9 Rings	No answer
1002	6 Rings	No answer
1003	5 Rings	No answer
1005	4 Rings	No answer
1007	5 Rings	No answer
1011	6 Rings	No answer
1020	11 Rings	No answer
1025	Joey	Mr Fischer

In: Hello Stephens
Out: John please
In: John's not here right now.
Out: Do you expect him.
In: He should have been here already, I don't know what happened
Out: I see
In: Who is this speaking?
Out: This is Al Fischer at Roosevelt Hospital
 are you Mr Fischer.

0858 11 Rings No answer
 0859 10 Rings No answer
 0921 9 Rings No answer
 0924 8 Rings No answer
 0935 10 Rings No answer
 0943 35 Rings No answer
 0945 13 Rings No answer
 1000 6 Rings No answer

1001 9 Rings No answer
 1002 6 Rings No answer
 1003 5 Rings No answer
 1005 4 Rings No answer
 1007 5 Rings No answer
 1011 6 Rings No answer
 1020 11 Rings No answer
 1025 Joey

JOE
 MESSINA

Mr Fischer

In: Hello Stephens
 Out: John please
 In: John's not here right now.
 Out: Do you expect him.
 In: He should have been here already, I don't know what happened
 Out: I see
 In: Who is this speaking?
 Out: This is Al Fischer at Roosevelt Hospital
 In: Yes how are you Mr Fischer.
 Out: Pretty good who is this
 In: This is Joey
 Out: Hey Joey
 In: How are you
 Out: How are you
 In: Everythings alright.
 Out: Yeah, what the hell happened to Jimmy
 In: Well he just pulled a disappearing act on us- he left us in
 fucking shambles here.
 Out: Gee thats unbelievable.
 In: Its unbelievable but its true
 Out: You know I saw him about a week ago Thursday.
 In: Yeah Thursday night that was the last night you saw him -
 thats the night I drove him down to see you.
 Out: And he said to me he's going to the wake - you know - those
 two fellars in Brooklyn
 In: He's full of shit he didn't go to no wake.
 Out: I said Gee did you know them , he says I know their father,
 I think I said.
 In: Yeah Yeah
 Out: He said they lived in the old neighborhood.
 In: Thats Right.
 Out: And so on and so forth, you know , thats all, I says
 alright Jimmy, I'll see you you know
 In: And that was the last you ever seen him and thats the last
 we ever saw him, Didn't call didn't do nothing just left us.
 Out: I can't understand it.

THE REST OF THE CONVERSATION ABOUT AIR CONDITIONER BUSINESS.

AFFIDAVIT

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

HIPOLITO NAVARRO, after being duly by law sworn, deposes and says: that he makes the instant affidavit of his own free will in the absence of any threats, duress, coercion or promises of any nature whatsoever.

That on or about December 9, 1972, the affiant herein was taken out of the Atlanta Penitentiary and transported, by two U.S. Marshal's, to the Federal Detention Headquarters at West Street, New York.

That he arrived at said West Street at approximately 3:30 P.M. on December 10, 1972.

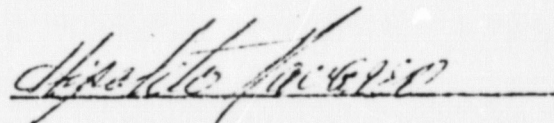
That within a day or so after the affiant's arrival at West Street, and while returning from the noon meal, he passed by a section of the jail known as Maximum Security. In the very first cell of maximum security, which was close to the area of the stairwell, the affiant saw a familiar looking individual watching television. Approaching the screen-off area of maximum security, for a closer and clearer view, the affiant recognized the individual as Joaquin Ramos. Who at that time was known to the affiant as Johnny Ramos.

That the affiant was surprised to see Mr. Ramos there because he had heard that Mr. Ramos had recently received a 20 years sentence in Ohio for violating that State's Narcotic Laws.

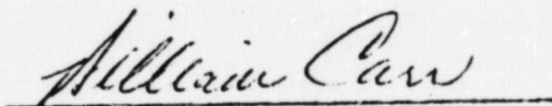
That the affiant spoke to Mr. Ramos expressing his curiosity for the latter being there and wanting to know if it was true that he (Ramos) was under a 20 year sentence. Upon recognizing the affiant Mr. Ramos conceded that it was indeed true that he was given a 20 year sentence in Ohio; however, he added that he was confident that he would beat the 20 years because of newly discovered evidence.

That the affiant became curious as to the nature of the newly discovered evidence but Mr. Ramos would not discuss it any further other than to say that he had recently become aware of the existence of tapes mentioning his name as well as others, and that said tapes would guarantee him a new trial and complete vindication.

That Mr. Ramos also indicated, to the affiant, in further conversation, that the tapes were responsible for his being at West Street and that because of them he had been subpoenaed to the Grand Jury in the Eastern District of New York.


Hipolito Navarro

Sworn to before me this
2 day of October 1975.



Public Officer: Authorized by 18 U.S.C. § 4004
July 7, 1966 to Administer Oaths (18 U.S.C. 4004)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, LEOLUCA GUARINO and
STEVEN DELLACAVA,

NOTICE OF MOTION
(M.E.F.)

73 Cr. 460

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Barry Ivan Slotnick, the Exhibits attached hereto, the trial transcript, and all the proceedings previously had herein, the undersigned will move this Court at a time and place to be fixed by the Court at the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 33 of the Federal Rules of Criminal Procedure and 18 U.S.C. Section 2255 for an order

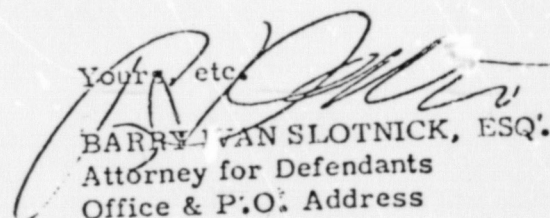
- (a) granting a new trial to the defendants;
- (b) dismissing the indictment herein; or in the alternative
- (c) granting a hearing to establish the illegality of the Government

evidence against the defendants

on the grounds that the defendants' conviction was caused as a result of a deprivation of their constitutional and statutory rights and for such other and further relief as to the Court is just and proper.

Dated: New York, New York
November 20, 1975

Yours, etc.


BARRY IVAN SLOTNICK, ESQ.
Attorney for Defendants
Office & P.O. Address
233 Broadway
New York, N.Y. 10007
212-233-5390

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN CAPRA, LEOLUCA GUARINO and
STEVEN DELLACAVA,

Defendants.

AFFIDAVIT
(M.E.F.)

73 Cr. 460

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BARRY IVAN SLOTNICK, being duly sworn, deposes and says:

1. I am the attorney for John Capra, Leoluca Guarino and Steven Dellacava and submit this affidavit in support of their application for relief pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and 18 U.S.C. 2255.

2. In April of 1973, Capra, Guarino, Dellacava and others* were charged in a five count indictment with violations of the narcotics laws. Count 1 alleged a conspiracy to violate the narcotics laws in violation of 26 U.S.C. Section 7237(b) and 21 U.S.C. Section 846. Counts 2 and 3 charged the sale of two kilograms of heroin in August of 1970 and one kilogram of heroin on November 6, 1970, respectively, in violation of 26 U.S.C. Section 4705(a) and Section 7237(b). Count 4 charged distribution and possession with intent to distribute 5-1/2 kilograms of heroin in October of 1971 in violation of 21 U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A); and Count 5 charged the same offense on that date with regard to one kilogram of cocaine.

3. Joaquin Ramos, an unindicted co-conspirator, testified against Capra, Guarino and Dellacava as to their roles in the conspiracy from 1969 to November, 1971 and as to their complicity in the crimes charged in counts

* Robert Jermain, Alan Morris and George Harris.

2, 3, 4 and 5. Ramos was the only witness at the trial connecting Capra, Guarino and Dellacava to the crimes charged in the substantive counts.*

4. The Government introduced at the trial several transcripts and recordings of wiretaps** involving Capra, Guarino and Dellacava in order to corroborate Ramos' testimony that this was an on-going conspiracy involving all of the defendants and further offered the testimony of officers and agents who conducted surveillances of the defendants on the basis of leads provided by the wiretapping. After a trial by jury, Capra, Guarino and Dellacava were found guilty as charged and a judgment of conviction was entered on each of the verdicts.

5. The Second Circuit Court of Appeals in United States v. Capra, et al., 501 F. 2d 267, reversed their judgments of conviction on Count 1 and affirmed their judgments of conviction as to counts 2, 3, 4 and 5. The reversal of the conspiracy was "mandated by both the illegal wiretapping ... and the resulting taint of police surveillance and subsequent wiretaps." United States v. Capra, et al., 501 F. 2d 276, fn. 5.

These subsequent wiretaps or bugs, authorized as a result of the Diane's Bar taps, were, to wit, an eavesdropping warrant dated March 9, 1972 on the premises of Ray's Stationery Store; two renewals thereof on April 8, 1972 and May 8, 1972; an eavesdropping warrant dated June 11, 1972 on the premises known as Steve's Air Conditioning and renewals thereof on July 12, 1972, August 15, 1972 and September 15, 1972 and eavesdropping authorization for a bug dated September 18, 1972 at the premises, 1023 Havermeyer Avenue and a renewal thereof on October 18, 1972 and eavesdropping authorization for a bug in an apartment in Whitestone, Queens, dated

* The other witnesses who testified at the trial related to the conspiracy charge or the complicity of the other defendants in the substantive counts.

** These wiretaps were referred to as the "Diane's Bar" taps.

February 15, 1973 and a renewal thereof on March 20, 1973.*

6. As a result of the bug authorization dated September 18, 1972 at 1023 Havermeyer Avenue, a conversation between Capra, Guarino and Dellacava was illegally overheard on October 2, 1972 which, according to Detective George Eaton, the monitoring agent, connected

"Guarino, Capra and Dellacava and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971 Dellacava, Capra, the unknown male and Guarino . . . thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes." (Affidavit of George Eaton dated October 18, 1972, Exhibit A, p. 3).²

Eaton's conclusion was based upon information told to him by James Nauens, a New York City police officer who had been involved in the arrest of Ramos in November, 1971, who had testified at Ramos' trial in Toledo and who had monitored wiretaps at Steve's Air Conditioning during Aug. of 1972. (Exhibit B). **

7. It is alleged by Capra, Guarino and Dellacava that the illegal bug at 1023 Havermeyer Avenue and the illegal wiretap at Steve's Air Conditioning were exploited by the Government to (a) identify them as Ramos' co-conspirators, (b) establish Ramos' innocence of the possession of narcotics in Toledo, Ohio, and (c) identify a Joseph Messina as the person who possessed the narcotics in Toledo, Ohio.

8. It is further alleged that based upon the information gained through the illegal wiretap and bug, the Government was able to deliver to Ramos a reduction of his 20 year sentence in Toledo to two years time served

* Capra, Guarino and Dellacava had, prior to trial, moved for suppression of the evidence gained as a result of each of those wiretaps and bugs based upon the contention that the Diane's Bar tap was illegal and that the results of the Diane's bar tap were used to gain each succeeding wiretap or bug authorization.

** The significance of the Steve's Air Conditioning tap, as will be shown infra, is that Nauens discovered that a Joseph Messina was connected to Capra, Guarino and Dellacava as a result of monitoring that tap. (Steve's Air Conditioning logs supplied by Government prior to trial herein, Exhibit B).

and probation in exchange for Ramos' testimony against Capra, Guarino and Dellacava.

9. The allegation made in the above paragraph is supported by the following evidence attached hereto as Exhibits C and D, the affidavit of Hippolito Navarro and the minutes of hearing in the Lucas County, Ohio, Court of Common Pleas, which evidence discloses:

a. that Ramos knew of the Havermeyer bug and its contents at the time he was brought to West Street pursuant to an Eastern District Grand Jury subpoena issued two or three weeks after his conviction in Toledo, Ohio, and

b. the evidence from the tap and bug was used by the Government to assure the Court in Toledo that Ramos was wrongfully convicted in Ohio and his sentence should be reduced.

10. Both the evidence supplied in the affidavit of Hippolito Navarro and the transcript of Ramos' Toledo re-sentence were unknown to the defendants at the time of trial since Navarro was incarcerated in the Atlanta Penitentiary during the trial and prior thereto and the re-sentence of Ramos in Toledo did not take place until after the trial. This evidence, disclosing as it does, the exploitation of illegal evidence by the Government, materially effects the constitutional and statutory rights of the defendants, is not cumulative or impeaching, and will probably produce an acquittal of the defendants on the substantive counts due to the fact that Ramos, as a witness, must be suppressed. Without his testimony, there is no evidence in the trial record against Capra, Guarino and Dellacava concerning counts 2, 3 and 4.

11. Ramos' actions, as corroborated by the trial transcript, and the affidavits and logs in connection with the wiretaps and bugs conclusively demonstrates that the reduction of Ramos' Toledo sentence was the quid pro

quo for Ramos' testimony and/or that the reduction of that sentence was a direct result of the Government's use of information gained as a result of the illegal taps and bugs.

12. In November of 1971, Joaquin Ramos was arrested and charged in Toledo, Ohio with the possession of 5-1/2 kilograms of heroin and one kilogram of cocaine. In September of 1972, after spending 11 months in the Lucas County, Ohio jail, he was tried and convicted of the conspiracy and possession upon the eyewitness testimony of three people who identified him as the person who left the suitcase containing the narcotics at the Toledo railroad terminal. Ramos was sentenced on the same day of his conviction to a 10 to 20 year term in the Ohio Penitentiary. After his "wrongful conviction", Ramos' nerves fell apart and he looked forward, because of his previous narcotics record, to at least ten years in jail before probation. (851, 973).*

During the time he awaited trial in the Toledo jail, agents came to see him and asked him to cooperate five or six times but he refused and told them not to bother coming and seeing him. (574, 585). Even after his conviction, BNDD Agent Kostecke visited him but was told by Ramos that he did not wish to cooperate with the Government. (700, 702). After the interception of the October 2 conversation between Capra, Guarino and Dellacava, Ramos was subpoenaed by an Eastern District Grand Jury and brought to the Eastern District where he spoke with Assistant United States Attorney Heinemann and officers Jackson and Nauens who asked him to cooperate. (464). Nauens knew of the October 2 conversation at that time and had discovered that Joseph Messina was connected to the defendants - all as a result of illegal eavesdropping. Ramos continued to refuse, however,

* Numerical references are to pages in the original trial record.

and claimed his privilege of self-incrimination when questioned in the Grand Jury by Heinemann. (466, 598). Before Ramos' testified in the Grand Jury against Capra, Guarino and Dellacava in relation to the substantive counts 2, 3, 4 and 5, Assistant United States Attorney Feffer made a trip to Toledo to speak to the Ohio Prosecutor, Melvin Resnick. (933. Sometime in the winter of 1972-1973, Ramos heard tapes and was promised that "if I testify against my suppliers, I would get two years time served and put on probation."

After the conviction of Capra, Guarino and Dellacava, Ramos was brought before the Ohio Court of Common Pleas by the Prosecutor, Melvin Resnick. It was disclosed to the Ohio Court that

"the Office of the United States District Attorney from New York ... discovered that John Ramos was not the person who actually brought the narcotics into the City of Toledo, that it was another person by the name of Joseph Messina."

The Court was further advised by Mr. Feffer that in September of 1972, Ramos

"was asked to cooperate against the suppliers and other people who were dealing in narcotics in the New York City area. As expected, he provided us with information primarily on three individuals; John Capra, Leo Guarino and a Steven Dellacava." (Emphasis added.)

The Court stated to Mr. Feffer:

"to grant a motion for a new trial is to fly into the face of the testimony of three people who identified Ramos here and put him here. That hurdle must be overcome.

Mr. Feffer, as an Assistant United States District Attorney, and irregardless of Mr. Ramos' offer and actually helping the Government are you convinced and will you give him your professional word you are convinced, and you had evidence presented in that trial, that evidence convinces you that John Ramos was not the courier who brought contraband into this jurisdiction."

Mr. Feffer replied that

"there are several reasons that we have discovered since the trial of Mr. Ramos that convinces our office and other people that Mr. Ramos, while he was fully involved with this transaction was not physically present in Ohio, did not personally deliver that suitcase to the terminal on October 20th."

Those reasons were based upon the discovery of Joseph Messina and the October 2 conversation:

"the name Messina came up during the course of the trial here in Ohio. Mr. Sibold testified that he had a conversation with the individual who left the suitcase; this individual wanted flight information to go back to New York City, and he gave the name Messina to Mr. Sibold, for the purpose of reserving a flight.

The taxicab driver, Mrs. Raudebush, testified in both cases, who picked him up at the terminal and drove him to the airport, and was an individual who also identified Mr. Ramos.

When he got to the airport a ticket was purchased, and that ticket was received in evidence in this trial, and the one in New York. And that ticket bore the name J. Messina.

Now an investigation conducted in New York subsequent to the Ohio trial revealed that there was in fact a person named Joseph Messina. And by coincidence this Joseph Messina was an employee in an air conditioning store in New York City that was owned and operated by Steven Dellacava, John Capra and Leo Guarino, the three people that supply Mr. Ramos with his narcotics.

In October of 1972, a bug was planted in a social club in the Bronx, and conversations of Capra, Guarino and Dellacava were intercepted. This was a court ordered bug, device.

At that time, conversations were intercepted between these three men, in which they discussed in some detail the delivery of this suitcase to the Toledo railroad terminal, and in which they mentioned the fact that Messina came to Toledo and very stupidly gave his own name at the railroad terminal and on the flight back to New York City.

They discussed this in some detail, as I said, and they indicated beyond any question that the person who brought the suitcase to Toledo for them was in fact J. Messina.

And finally, I think most important, is what Mr. Resnick has already made reference to; an envelope addressed to Willie Middlebrook, and a note which had on it, go to Penn Central Railroad terminal, Toledo, Ohio, open during

the daytime only, or words to that effect, were found I believe on the person of Alan Morris at the end of October.

THE COURT: At the time he was booked.

MR. FEFFER: At the time he was arrested, that is correct. And Joseph Messina was ordered by the District Court Judge in New York to produce handwriting exemplars. He did so.

And his handwriting was then compared with the handwriting on the envelope to Mr. Willie Middlebrook, and the note inside, the directions to go to the Penn Railroad station.

And there was a positive identification, as testified to by the handwriting analyst at trial in New York, that the individual, Messina, positively wrote the writing on the envelope, and the note.

There was further testimony both at this trial and the trial in New York, by a postal inspector, that that note and envelope was sent from Toledo to Detroit, Michigan on October 20th, 1971, the date in question.

So there can be little question that the individual who wrote that letter, that note, and addressed it to Middlebrook, was the same person who brought the suitcase to this area.

Based on these facts, and on a full debriefing of John Ramos, at which he admitted complicity in narcotics dealings going back to 1952, with this one exception, we are convinced that Joseph Messina was the individual who appeared in Toledo with that suitcase on October 20th, 1971". (Exhibit D, page 13 to 15.)

13. The Navarro affidavit (Exhibit C), clearly demonstrates that the illegally seized conversation of October 2, together with the illegally seized information concerning Joseph Messina, obtained by Nauens, were the instruments by which Ramos' testimony was bargained for and procured. Ramos' own testimony at the trial concerning the promise made to him by the Government, prior to his testimony, that he would receive exactly what he did receive and Assistant United States Attorney Feffer's visit to the Ohio Prosecutor, Mr. Resnick, prior to Ramos' testimony in the Grand Jury, support the contentions made by the defendants herein.

14. The Government, when it asked Ramos to cooperate, expected cooperation against Capra, Guarino and Dellacava because they had information procured from illegal wiretaps. The Government exploited the wiretaps to directly influence Ramos and the Toledo Court.*


15. Nauens' role as a monitoring agent of the Steve's Air Conditioning wiretap, whereby he discovered the connection between Joseph Messina and the defendants together with his interpretation of the October 2 conversation for Detective Eaton similarly corroborates the defendant's contention that the illegal wiretaps were exploited by the Government to obtain their convictions through the testimony of Joaquin Ramos.

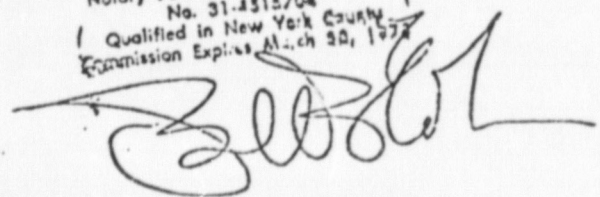
16. Clearly, the Navarro affidavit finally establishes the fact that Ramos became a Government witness due to and caused by the illegal interception of the October 2 conversation between the defendants.

17. This Court, therefore, should grant the defendants' application for dismissal of the indictment or "at a minimum" order a hearing. (See 1126 - 1128):

Sworn to before me this

20th day of November, 1975.


BARRY IVAN SLOTNICK


BERNARD R. BROWN
Notary Public, State of New York
No. 31-4515704
Qualified in New York County
Commission Expires March 22, 1977

* The other reasons put forth by the Government for reduction of sentence in Toledo were cumulative facts effecting witnesses' credibility and in all likelihood would have been declared immaterial and lacking the force and effect required to grant a new trial.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio

vs

Joaquin John Ramos

)
)
)
)
)

Case No. CR71-6084

Transcript of proceedings had in the above-
entitled cause, commencing on Tuesday, the
4th of December, 1973, at 4:10 o'clock P.M.,
before the Honorable John J. Connors, Jr.,
one of the Judges of said Court.

APPEARANCES:

MELVIN L. RESNICK, Esquire
and

CHARLES J. DONEGHY, Esquire

Assistant Prosecuting Attorneys
On Behalf of the State of Ohio

GERALD FEFFER, Esquire

Assistant U. S. Attorney
7th District of New York
U. S. Court House
Foley Square
New York, N.Y. 10007

JOHN J. CALLAHAN, Esquire

On Behalf of the Defendant.

Court Room No. 3
Lucas County Court House
Toledo, Ohio
Tuesday, December 4, 1973
4:10 o'clock P.M.

THE COURT: Cause No. CP71-6084, the
State of Ohio versus Joaquin John Ramos.

Trial docket sheet indicates that the defendant, under an original indictment returned on the 10th day of November, 1971, was charged with violation of Section 3719.20(A) possession of narcotic drugs for sale; second count a violation of Section 3719.20(H) of the Ohio Revised Code, conspiracy to violate Section 3719.09 of the Ohio Revised Code.

Subsequently various pre-trial motions having been disposed of, and on a plea of not guilty, the matter came on for trial before a jury on the 21st day of September, 1972.

On the 29th of September, 1972, the docket sheet entry reads as follows: Jury resumed its deliberations at 9:35 A.M. At 1:00 P.M. the jury returned with verdicts finding the defendant Guilty as to each of the two counts laid in the indictment, each verdict being signed by twelve members of the jury. The Court inquired of the defendant as to whether he had anything to say as to why sentence

should not then be pronounced. He replied in the negative. It was the sentence of the Court that the defendant, on being found guilty of the charge laid in the First count of the indictment, violation of Section 3719.20(A) O.R.C., illegal possession of narcotic drugs for sale, be confined in the Ohio penitentiary until released according to law (not less than 10 nor more than 20 years). It was further the sentence of the Court that the defendant, on having been found guilty of the charge laid in the Second count of the indictment, violation of Section 3719.20(H) O.R.C., conspiracy to violate Section 3719.09 O.R.C., be confined in the Ohio penitentiary until released according to law (not less than 10 nor more than 20 years). It was the further sentence and order of the Court that the sentences then imposed be served concurrently. It was further recommended that the defendant be given credit for the time he was incarcerated in the Lucas County jail, to-wit, from December 16th, 1971 until September 29, 1972.

Subsequently and timely a motion for a new trial was filed by counsel on behalf of the defendant.

And then on the 14th day of December, 1972, a motion for a new trial on the grounds of newly discovered evidence was filed.

That motion is pending before the Court, and

it has never been ruled on.

Mr. Callahan, you are here appearing on behalf of the defendant, is that my understanding?

MR. CALLAHAN: I am, Your Honor. Let me say I was requested by Mr. Resnick, from the Prosecutor's Office, to counsel with the defendant in this matter. I understand the defendant's prior counsel has withdrawn, or has no further connection with the matter; or defendant has discharged prior counsel.

THE COURT: Mr. Santangelo, under date of March 22nd, 1973, sent me a letter in which he indicated that Mr. Ramos had asked him to represent him no further in the case.

And also I have a letter addressed to me, signed by the defendant, that he has under date of May 8th, 1973, discharged Mr. McCullough as his attorney, and indicates that he is presently incarcerated, and without funds, and he asked the Court at that time to appoint new counsel to represent him inasmuch as he was incarcerated and without funds.

So I have an indication from Mr. Ramos, and from Mr. Santangelo, his counsel, that they no longer represent him in the case. And in view of the defendant's indigency we will appoint you to represent him in these

proceedings.

MR. CALLAHAN: I will serve at the pleasure of the Court, Your Honor.

THE COURT: I appreciate your doing that, Mr. Callahan.

Very well. Am I to entertain the motion for new trial at this time; is that the purpose of this hearing, Mr. Resnick.

MR. RESNICK: Yes, Your Honor. The motion for new trial was filed by the defendant, and I believe that his motion did state that there was some newly discovered evidence, ^X and that evidence came to their knowledge through our office, and the office of the United States District Attorney from New York, wherein it was discovered that John Ramos was not the person who actually brought the narcotics into the City of Toledo, that it was another person by the name of Joseph Messina; ^X that the Court will recall the airline tickets that were purchased here in Toledo, Ohio, did contain the name of Joseph Messina.

THE COURT: That is correct.

MR. RESNICK: Further, as corroborative of the fact that Mr. Ramos did not bring in the narcotics to the City of Toledo, is the handwriting analysis which was subsequently performed on the writings that were

introduced into evidence, the letter that was sent to Willie Middlebrook in Detroit, and the instructions go to Penn Central Station, a handwriting analysis was done of Mr. Messina's writing, and it compared very well with the writing on the envelope and the instruction sheet, that was put into evidence.

^x In addition there was some other evidence, through other persons who were directly involved in the narcotics business in New York and responsible for the shipment here in Toledo, certain conversations by them which indicated that it was in fact Joseph Messina and not ^x John Ramos who brought the heroin here.

In view of that subsequent information, the State has no objection to the granting of a motion for new trial as to Count 2 of the indictment, the conspiracy count, because all of the evidence on that conspiracy count was based on the fact that he was here in the City of Toledo.

However, as to the possession of narcotics for sale, it is my understanding that Mr. Ramos was to receive some of the funds in this, and I think that that conviction should stand.

THE COURT: Mr. Callahan, have you had sufficient time to speak with your client?

MR. CALLAHAN: If it please the Court.
Mr. Ramos and I discussed this matter in the Prosecuting Attorney's office prior to coming to court today. We were in private consultation.

Prior to that private consultation Mr. Feffer explained the situation with respect to the proceedings in New York. It was done in my presence, and the presence of the Defendant Ramos.

And in the conference with the defendant following this rather detailed explanation by Mr. Feffer, the defendant indicated to me that he would press the motion for a new trial on the charge of the conspiracy, but made no request to press it on the charge of possession of narcotics for sale.

Is that a correct statement of our conference, Mr. Ramos?

MR. RAMOS: Yes, sir.

THE COURT: Thank you. I would like a statement from you, sir. I would appreciate it if you would identify yourself in the record.

MR. FEFFER: My name is Gerald Feffer, I am Assistant United States Attorney with the Office of the Justice Department, 7th District of New York.

Your Honor, basically I can substantiate all of

what Mr. Resnick said. I think the record should reflect clearly, as Mr. Ramos indicated earlier, that he did in fact receive a portion of the proceeds of the money that was paid by Morris and other people for these narcotics. He received this money in New York City. And there is no question, to that extent he was involved.

Now in terms of the cooperation which Mr. Ramos has given or supplied the Federal Government, I can state briefly that following his conviction in September of 1972 he was brought to New York. At that time he was asked to cooperate against the suppliers and other people who were dealing in narcotics in the New York City area.

As expected, he provided us with information primarily on three individuals; John Capra, Leo Guarino, and a Steven Della Cava. These men distributed to himself and other people substantial quantities of narcotics.

These three men, along with some eighty others, were indicted last April, 1973. And Capra, Guarino and Della Cava and others were tried during the months of September, October and November in New York City.

At that trial Mr. Ramos testified against each of these three men, and others. On the basis of his testimony in large part, these people were convicted.

Now he also provided information as to the

heroin distribution system in general in New York. This provided valuable intelligence with respect to other cases.

I might say briefly that Capra, Guarino and Della Cava are major importers of heroin into this country; that they are at the very top, the very top echelon of the narcotics distribution system in New York and the remainder of this country, and his cooperation against these people was directly responsible for their convictions.

He has also agreed to testify in a case in the Southern District of New York, in December of this year, against other people also heavily involved in heroin distribution.

And again he has agreed to cooperate fully with our office and Mr. Resnick's office in the future, should his testimony be required, in connection with any case relating to any criminal enterprise in the future.

In closing I think it should be brought out that Mr. Ramos was not only a business associate of Guarino, Capra and Della Cava, but he and his family, his wife and two kids, were very close to each of these three people, in fact Guarino was the Godfather of his younger child.

His life today unquestionably is in danger. His wife and children have been relocated to another area of the country. Their names have been changed. His name

will be changed.

And I think that should be brought out for Your Honor to consider with respect to this motion.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Feffer.

MR. RESNICK: If the Court please, we do have an article which appeared in the D.E.A., Drug Enforcement Administration magazine, concerning the convictions and arrests of all of these people. If the Court wishes to --

THE COURT: I am not going to take time to read it now, but I would like to. I am sure it will be very interesting.

Gentlemen, I appreciate, No. 1, Ramos' concern for his life, safety of his wife and his children.

I have to assume that the gentleman at the door is the United States Marshal, am I right, sir?

U. S. MARSHAL: Yes, sir.

THE COURT: I appreciate your appearance here, I appreciate the duty you are performing. And I appreciate the fact that the Government has extreme difficulty both in its investigations and its convictions, and I was absolutely amazed during the course of this trial here in Toledo, the efforts that are being made constantly between the federal authorities and state authorities, and

in our case New York, Cleveland, in attempting to get sufficient evidence to get a conviction, and I was amazed at the difficulty that the federal government and the state government has in the prosecution of this type of case.

I appreciate the fact that when someone as a defendant, Ramos, risks his life, life of his family, to cooperate, and it may be only for a hope of reward that he takes a great risk.

The thing that I am concerned about is that substantial justice is done in this case. I tried this case, a jury found the defendant guilty. To grant a motion for a new trial is to fly into the face of the testimony of the three people who identified Ramos here, and put him here. That hurdle must be overcome.

Mr. Feffer, as an Assistant United States District Attorney, and irregardless of Mr. Ramos' offer and actually helping the government, are you convinced, and will you give me your professional word you are convinced, and you had evidence presented in that trial, that evidence convinces you that Joaquin Ramos was not the courier who brought contraband into this jurisdiction.

MR. FEFFER: Yes, Your Honor. And I would be happy if Your Honor would like for me to spell

out in some detail the reasons for my conclusion.

THE COURT: I want you to appreciate the concern of the citizens of this community, and I am sure the citizens of any community would be concerned, and are entitled to an explanation and can be assured that substantial justice is being done. I would appreciate that in my record.

MR. FEFFER: Fine, Your Honor. Would Your Honor like me to go through this in some detail, the reasons.

THE COURT: I would appreciate it.

MR. FEFFER: As Your Honor stated, there were three witnesses that identified John Ramos as the individual who came to Toledo, Ohio, with the suitcase full of narcotics on October 20th of 1971.

Now there are several reasons that we have discovered since the trial of Mr. Ramos, that convinces our office, and other people, that Mr. Ramos, while he was fully involved with this transaction, was not physically present in Ohio, did not personally deliver that suitcase to the terminal on October 20th.

First, two witnesses have testified at the trial in New York; Mr. Sibold and Mr. Julert. They were both

employees of the Penn Railroad terminal. And they testified that the individual that they saw October 20th very definitely parted his hair on the right side. Mr. Ramos today, as Your Honor can see in court, and at that time, parted his hair on the left side.

Secondly, each of the three witnesses testified that John Ramos was not wearing eyeglasses, or that the man who made the delivery to Toledo, Ohio, was not wearing eyeglasses.

John Ramos at the time, October of 1972, was very definitely wearing eyeglasses. He was seen in New York during October, during the Fall and Summer of 1971, and he always had eyeglasses on. In fact his eye vision is quite poor, and it requires him to wear eyeglasses.

Third, the name Messina came up during the course of the trial here in Ohio. Mr. Sibold testified that he had a conversation with the individual who left the suitcase; this individual wanted flight information to go back to New York City, and he gave the name Messina to Mr. Sibold, for the purpose of reserving a flight.

The taxicab driver, Mrs. Raudebush, testified in both cases, who picked him up at the terminal and drove him to the airport, and was an individual who also identified Mr. Ramos.

When he got to the airport a ticket was purchased, and that ticket was received in evidence in this trial, and the one in New York. And that ticket bore the name J. Messina.

Now an investigation conducted in New York subsequent to the Ohio trial revealed that there was in fact a person named Joseph Messina. And by coincidence this Joseph Messina was an employee in an air conditioning store in New York City that was owned and operated by Steven Della Cava, John Capra and Leo Guarino, the three people that supply Mr. Ramos with his narcotics.

X In October of 1972 a bug was planted in a social club in the Bronx, and conversations of Capra, Guarino and Della Cava were intercepted. This was a court ordered bug, device.

At that time conversations were intercepted between these three men, in which they discussed in some detail the delivery of this suitcase to the Toledo railroad terminal, and in which they mentioned the fact that Messina came to Toledo and very stupidly gave his own name at the railroad terminal and on the flight back to New York City.

They discussed this in some detail, as I said, and they indicated beyond any question that the person who brought the suitcase to Toledo for them was in fact J. Messina. X

And finally, I think most important, is what Mr. Resnick has already made reference to; an envelope addressed to Willie Middlebrook, and a note which had on it, go to Penn Central Railroad terminal, Toledo, Ohio, open during the daytime only, or words to that effect, were found I believe on the person of Alan Morris at the end of October.

THE COURT: At the time he was booked.

MR. FEFFER: At the time he was arrested, that is correct. And Joseph Messina was ordered by the District Court Judge in New York to produce handwriting exemplars. He did so.

And his handwriting was then compared with the handwriting on the envelope to Mr. Willie Middlebrook, and the note inside, the directions to go to the Penn Railroad station.

And there was a positive identification, as testified to by the handwriting analyst at trial in New York, that the individual, Messina, positively wrote the writing on the envelope, and the note.

There was further testimony both at this trial and the trial in New York, by a postal inspector, that that note and envelope was sent from Toledo to Detroit, Michigan on October 20th, 1971, the date in question.

So there can be little question that the individual who wrote that letter, that note, and addressed it to Middlebrook, was the same person who brought the suitcase to this area.

Based on these facts, and on a full debriefing of John Ramos, at which he admitted complicity in narcotics dealings going back to 1952, with this one exception, we are convinced that Joseph Messina was the individual who appeared in Toledo with that suitcase on October 20th, 1971.

THE COURT: And not John Ramos.

MR. FEFFER: That is correct, and not John Ramos.

I think it is important to point out, Your Honor, and the defense spent days and days arguing this at the trial in New York City, that John Ramos was not telling the truth, that he would lie to help the government.

Well, I think that if John Ramos wanted to lie to help the Government, the one transaction he would have testified to having made himself would have been that delivery to Toledo, Ohio, because by saying that he was not the individual, he made our case, the case of the U. S. Government much more difficult to try.

We had to produce three witnesses who were in essence saying John Ramos was the man who made that

delivery, and we had to convince that jury that John Ramos did not make that delivery. And, in fact, I can say that we were successful in doing that.

THE COURT: Thank you, very much. It is my understanding that an identification attempt was made by some of the witnesses who appeared in this court, at the pre-trial investigation, or pre-trial hearings in New York in that case.

MR. FEFFER: That is correct, Your Honor.

THE COURT: I would appreciate you letting me know what happened there.

MR. FEFFER: We had some photographs of John Ramos that were taken during the Winter of 1971, and he was seated at a table in a restaurant, nite club, in one of these photographs, with John Capra, Robert Germain, and other people who were not part of this case.

Two witnesses, I believe it was Mrs. Raudebush and Mr. Julert, were asked to look at this photograph, and to pick out John Ramos.

Mr. Julert prior to trial, at the pre-trial stage, looked at the photograph and, pointing to John Capra, said that's the man that delivered the suitcase to Toledo, Ohio. Mrs. Raudebush said that John Ramos was not in the photograph at all.

I think that the problem of eye witness identification, especially when you are dealing with three people who only have a very brief opportunity to confront an individual, is a very serious one.

An example that we had occur at the trial, which puts this into perspective, is the following:

We had a New York police officer, with considerable experience in narcotics investigations, who took photographs of John Capra, Leo Guarino and many other people, in October of 1972 in the street area of New York City, and he had not seen John Capra in one year when he took the stand.

He took the stand, and he was asked during the course of his testimony to point out John Capra in the courtroom, if he saw him. And he mistakenly pointed out Robert Germain, who in fact does resemble in appearance John Capra.

Here is an experienced police officer, who during the course of a year was unable to identify Capra. And there is no question that the photographs contained the picture of John Capra.

I think, and there is no question about this, that Joseph Messina in October of 1971, did resemble very closely, in height, many other critical aspects, John Ramos.

And so it is very difficult to lay any blame anywhere. People can make mistakes, and I think, unfortunately, in this case a mistake was made.

THE COURT: Thank you, very much, Mr. Peffer. I am satisfied, gentlemen. Motion for new trial will be granted.

MR. RESNICK: At this time, if the Court please, in regard to the sentence that was imposed on the First count of the indictment, the possession of narcotic drugs for sale, the State would ask the Court to reconsider the sentence heretofore imposed, and based upon the testimony and the cooperation and the convictions that were obtained in New York, we would ask the Court to consider probating Mr. Ramos to the federal authorities.

I think Mr. Callahan has some information in regards to what disposition is going to be made, and Mr. Peffer can certainly fill the Court in with anything that Mr. Callahan does not have. The State of Ohio has no objection to that probation; Mr. Ramos has been in custody for two years.

THE COURT: I have a motion for a new trial. It would be my understanding that, in that event, there is pending before the Court a plea of not guilty.

MR. RESNICK: Your Honor, the motion for

new trial that was urged was only as to Count 2 of the indictment, the conspiracy charge.

THE COURT: I understand.

MR. RESNICK: The Court having ordered a new trial in that regard, the State would request a nolle pros on that count.

THE COURT: At the request of the Office of the Prosecuting Attorney, and for good cause shown, a nolle prosequi is ordered entered as to the Second count of the indictment.

MR. RESNICK: Thank you, Your Honor.
Now as to the First count, and the remaining count --

THE COURT: Possession for sale.

MR. RESNICK: Right. I think Mr. Callahan would like to address the Court on the sentence imposed.

MR. CALLAHAN: The defendant was arrested November 10th, 1971 here in Toledo. He remained in the Lucas County jail until the time of his trial, and he was convicted in September of 1972. He has remained confined since that time.

So it is approximately a little better than two years since the time of his arrest, and he has been in confinement.

We would ask that the Court, in considering

probation to the federal authorities in this matter, recognize that he has served over two years of the sentence for possession for sale, and that the Court weigh this in its consideration in determining whether or not to place the defendant on probation to the federal authorities.

His cooperation with the federal authorities, and his conduct since that time, justifies a consideration for probation, and for giving him full credit for the time that he has served, in consideration of that probation.

THE COURT: You know, the last I heard of John Ramos, I had sentenced him to the Ohio penitentiary. Did you ever get there, Mr. Ramos?

MR. RAMOS: No, Your Honor.

THE COURT: You never got there.. I sentenced you.

MR. RESNICK: The sentence wasn't put into enforcement, that is why I believe the Court still has the power to reconsider the sentence. He was remanded to the Lucas County jail so that the motion for new trial could be filed and argued, before he was sent to the penitentiary.

THE COURT: Then what happened.

MR. RESNICK: Subsequently, lo and behold a subpoena arrived from a grand jury in New York, and

Mr. Ramos was spirited away.

THE COURT: You wound up in New York then?

MR. RAMOS: Yes.

THE COURT: And you've been in custody ever since?

MR. RAMOS: Yes.

THE COURT: You've not been out on bond, have you?

MR. RAMOS: No, sir. I've been under protective custody, U. S. Marshal.

THE COURT: Go anyplace else beside New York?

MR. RAMOS: No.

THE COURT: When you are in protective custody of the United States Marshal where do you sleep at night?

MR. CALLAHAN: He means what type of place do you sleep in.

MR. FEFFER: Would you like, Your Honor, me to explain in more explicit terms what this detail concerns?

THE COURT: I would appreciate it, for my own edification.

MR. FEFFER: With witnesses like Mr. Ramos, who have been threatened, or who have contracts

placed on their life, they are put in a special institution, and they are guarded around the clock by federal marshals. They are not free to leave. It is a jail type institution, but it is just segregated in a way from the normal jail type institution.

THE COURT: Thank you, Mr. Feffer.

He's been in custody; he hasn't been able to go home, he and his wife and family haven't been able to go to the horse races in the afternoon, or anything.

MR. FEFFER: Definitely not

THE COURT: What you are asking me to do is suspend the sentence that was imposed on 9/29/72, and in consideration of the fact that he has been in custody since he was arrested --

MR. CALLAHAN: November 10th of '71.

THE COURT: November 10th of 1971, take that time into consideration, sum up the balance of the sentence and place him on probation.

MR. CALLAHAN: That is what we are asking, Your Honor.

MR. RESNICK: I think the Court should be apprised of one further thing. I am not too familiar with this; it is my understanding that if the Court places him on probation, that Mr. Ramos, who has a prior conviction

for a narcotics offense, must face the New York Parole Board. It is my understanding that there is no guarantees, we don't know what is going to happen with that Parole Board decision, that is up to them.

THE COURT: They may pick up this conviction as a violation of the terms of his parole, is that right?

MR. FEFFER: Yes, Your Honor. This conviction very well, is very likely to be considered a violation. He has served two years, and I believe at the time of the arrest that he had four and a half years remaining on his parole.

So he has approximately two and a half more years to serve, and there is no guarantee that he will be released prior to the two and a half year period to run in the future.

THE COURT: Actually the fact he was in custody may total that parole period.

MR. FEFFER: That is very possible. We are going to recommend --

THE COURT: I understand. Very well. I just want to make sure who I am going to probate him to now.

MR. FEFFER: Be to the U. S. Government,

and specifically to the U. S. Marshal Service.

THE COURT: Imposition of sentence which was imposed on 9/29/72 is suspended, defendant is placed on probation to the United States Marshal Service. Very well, so ordered. Costs to be suspended. Costs of this particular hearing are suspended, the other costs were already taxed.

Anything else, gentlemen.

MR. FEFFER: Thank you, very much, for permitting me to appear before the Court.

THE COURT: I appreciate you appearing, and I wanted your remarks in the record, to protect my own record.

MR. FEFFER: I can understand that.

* * * * *

I, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING IS A FULL AND COMPLETE TRANSCRIPT OF THE PROCEEDINGS HAD IN THE CASE OF STATE OF OHIO VS. JOAQUIN JOHN RAMOS, No. CR71-6084 ON THE 4th DAY OF DECEMBER, 1973.

E. A. Holewinski
E. A. Holewinski
Official Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOHN CAPRA, LEOLUCA GUARINO
and STEPHEN DELLACAVA,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.
-----X

AFFIRMATION

75 C 6183

Related Case
73 CR 460
M.E.F.

BARRY IVAN SLOTNICK, an attorney duly admitted to practice law before the courts of the State of New York, upon information and belief and under penalty of perjury, duly affirms as follows:

1. That he presents this Affirmation in reply to the Government's affidavit.

2. The affidavit in opposition presented by the Government* correctly identifies the claim of taint as it relates to Ramos' testimony. However, the articulation that this specific claim was rejected in those courts is incorrect. The Government's referral to the Capra case was merely their reading of the record which was not as full as presented herein -- with regard to the issue of taint. In fact, this Court recognized that a taint hearing would be held if the Diane's Bar wiretaps, et al were found to be illegal, and in any event this relief would be considered post-trial. Accordingly, as a result of this Court's

* Feffer affidavit

decision upholding the legality of the aforementioned wiretap, no taint hearing tracing the flow of information from Diane's Bar to the subsequent wiretaps and surveillance could occur.

3. The defendants' attempt to trace the investigation subsequent to the Diane's Bar wiretaps was cut off by this Court. At that time Detective Eaton was asked whether he commenced the an investigation of Ray's Stationery Store after following Dellacave there as a result of wiretap surveillance at Diane's Bar. The Government's objection to questions concerning subsequent investigations was sustained by the District Court. (Appendix, Vol.4 -p. 1126 annexed hereto). Accordingly, no further inquiry was allowed by the Court to trace the taint of the primary illegality alleged and the Court clearly stated to the defense that it would consider taint

"at a much later time because I don't know what evidence the Government proposes to adduce at the trial. If I order the fruits of this wiretap suppressed, I think the ball is then in the Government's court and it is the Government's obligation to see that none of the fruits obtained directly or indirectly as a result of that illicit eavesdropping is used at the trial." Id. at 1127. (annexed hereto)

overruled counsel's request for a pre-trial taint hearing and envisioned that a taint hearing could only be held post-trial if the wiretaps were suppressed, An example of the colloquy is the following:

"MR. SLOINICK: Well, if Your Honor does not suppress and Your Honor is wrong in doing that, we have a problem back in the Court of Appeals

and I hope at least to establish a part record now, where it wouldn't be necessary, if it does happen to send it back down here.

THE COURT: I assume it is going to be reversible error if I fail to suppress this wiretap and it should have been suppressed. I would hope I am not sitting long days and Sundays on something that is liable to be an academic question...I think that if that is reversible error in overruling your minimization contention, Mr. Slotnick, we can all fairly predict as lawyers that the Court of Appeals AT A MINIMUM IS GOING TO SEND THE CASE BACK TO HEAR TAINT and all kinds of other things. Therefore, I don't see any reason to anticipate that now and trail all the way through the remote direct or indirect consequences of these taps. So on the grounds I tried to outline for you in the past, I want you to limit this hearing...as it affects the question whether the evidence from these taps ought to be suppressed." (Appendix, Vol. 4 -pp. 1127-1128) (emphasis added).

4. Subsequently, the defendants Capra, Guarino and Dellacava again raised the issue with regard to a TAINT HEARING. As counsel stated:

"One last thing, and I express confusion at this point, Your Honor indicated that he would hold, if there be a trial and if there be a conviction, any Taint Hearing which will be held at the end on the Trial. That was something Your Honor had mentioned on our first day.

I have submitted some lengthy papers with regard to leads and identity of witnesses and whatever of what I consider illegal taint records and warrants. Will that be held at the end of the Trial or do you want me to mention it specifically now?

THE COURT: ...What I mean to convey to you is simply that if and when there is a Taint Hearing, it would follow rather than precede the Trial. I don't want you to leave here today or at any time with the understanding that a Taint Hearing is an inevitable feature of your future.

...THE COURT: ... I don't mean to stop for a few days for a voir dire either on Taint problems during the trial. But I do mean to let you preserve that objection on any occasion when you perceive that might be pertinent and it is up to you to reserve it."¹ (Appendix, Vol. 5 -pp. 1583-1586).

5. Thereafter, the defendants pursued the point as to the witness Ramos.

"... My chief concern, and I don't think it is a great secret, is that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos and I would move to suppress the witness Ramos...". (Appendix, Vol. 5, pp. 1585-86).

6. With regard to the defendant's motions to suppress the wiretaps and the evidence derived therefrom, this Court determined that if he found the wiretaps to be proper then the Taint Hearing would only be held upon a reversal of his position by the Circuit Court of Appeals which would "at a minimum" remand this matter back for a Taint Hearing. (Appendix Vol. 4, pp. 1127-1128).²

¹Subsequent to the Government's Opening and prior to the Opening for the defendants' counsel stated the following to the Court: "MR. SLOINICK: I am also constrained for the purpose of the record at this time to move... at least suppress as a result of this statement of the Government. It is my belief that most of the evidence will come as a result of tainted sources. THE COURT: All right denied." Trial Record 27-28.

²The procedure adopted by this Court holding in abeyance any taint issue until after a decision was made as to the alleged primary illegality the wiretapping at Diane's Bar comports with that stated in Alderman v. United States, 394 U.S. 165 (1969) wherein the Supreme Court

"remanded to the District Court...for a hearing findings and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance." *Id.* at 186. (Emphasis added)
(Continued on page 4)

This Court's post-trial decision upholding the legality of the Diane's Bar wiretap thereby foreclosed any taint inquiry based on that wiretaps illegality and the consequent illegalities which flowed and tainted the subsequent taps and the information derived therefrom.³

7. The motions submitted by the defendants Capra, Guarino and Dellacava had traced each wiretap and the underlying affidavits which were attached as exhibits. One of those attached and discussed in the motion papers -- the Extension of Eavesdropping Warrant dated October 18, 1972 -- clearly revealed that eavesdropping conducted on October 2, 1972.

"connected GUARINO, DELLACAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971." (See Detective Eaton's affidavit of October 18, 1972 attached as Exhibit "F" to the motions filed prior to trial. Appendix, Vol. 1 -p. A-22.)

8. After hearing the conversation of October 2, 1972, Detective Eaton further stated that

"Dellacava, Capra, the unknown male, and Guarino have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes." Ibid.

2. (Con't.)

See also, United States v. Schipani, 414 F.2d 1262 (2nd Cir., 1969); United States v. Maggadino, Docket No. 73-1933, decided May 2, 1974, p. 3103; United States v. Paroutian, 299 F. 2d 486 (2nd Cir., 1962); United States v. Cole, 463 F. 2d 163 (2nd Cir., 1972); United States v. Falley, decided November 28, 1973, at p. 544).

3. This Court did, however, leave open the opportunity for any defendant to show taint flowing from later wiretaps which might be defective if "studied for minimization." (Footnote 1 of Memorandum dated December 4, 1973, Appendix, Vol. 1-p. A-227). The defendants, however, claimed taint not from any failure to minimize any particular wiretap but from the primary illegality of the Diane's Bar wiretap which flowed and supported each succeeding wiretap authorization.

Thus, the first awareness that the Government had that Guarino, Capra and Dellacava had any connection with Ramos concerning any narcotics transactions came as a result of eavesdropping which this Court has considered to be tainted by the primary illegality of the Diane's Bar wiretap. For, as the Court stated:

"...Reversal of the conspiracy count as to Capra, Guarino and Dellacava, is mandated by both the illegal wiretapping after December 19 and the resulting taint of police surveillance and subsequent wiretaps..." (Slip op. at p. 4999) (Emphasis added.) 501 F2d 267 (2nd Cir. 1974), cert denied, 420 U.S. 990 (1975).

9. It was clear, however, and the Second Circuit Court of Appeals found that

"the defendants contended that if the Trial Court upheld any of these objections (to the Diane's Bar wiretaps), all evidence which was the product of this wiretap should be suppressed." (Slip op. at p. 4996).⁴

10. The pertinent wiretap applications including the major one which obviously lead to the discovery of Ramos were before this Court and there can be no question that the identity of Ramos and his connection with Capra, Guarino and Dellacava were discovered

4. The motions filed on behalf of Capra, Dellacava and Guarino, traced the illegality of the Diane's Bar wiretaps through each succeeding wiretap ending with bugs which were installed and listened to at 1023 Haverhayer Avenue, Bronx, in September-October 1972 and in a Whitestone apartment in February, 1973. Defendants specifically noted that all of the wiretaps were based upon the original order of December, 1971 and that he asks suppression "of all of the evidence that flowed therefrom as a result of the original and continuing taint." (Affidavit of Barry Ivan Slotnick, Vol. 1 of the Appendix p. A-52). Guarino's motion attached each of the wiretaps and bugs which were conducted continuously from December, 1971 through February, 1973 and made demand pursuant to Rule 41E of the Federal Rules of Criminal Procedure "for a hearing in regard to the suppression of the above mentioned evidence and all evidence resulting therefrom." (Emphasis added.) (Affidavit of Dennis D.S. McAlvey at Vol. 1, pp. A-118-119 of the Appendix filed herein.) Guarino

(Con'td. on p. 6.

as a result of the conversation overheard at the Havermeyer Club on October 2, 1975 ⁵ (the conversation together with its direct flow to Ramos is prima facie, the result of listening to the wiretaps). (See paragraph 4(b) at Appendix, Vol. 1, p. A-22). Therefore, the Court of Appeals statement there there is no indication the police identified Ramos or asked him to testify as a result of the evidence uncovered by the wiretaps is corrected by new and other evidence submitted in this proceeding. ⁶.

4. (Con't) also claimed that the evidence obtained from the Diane's Bar wiretap was used as a basis for each succeeding wiretap commencing with the wiretap at Ray's Stationery Store and ending with the Havermeyer bug and the Whitestone bug. Id. at 121, 140. In addition, each of the above defendants joined the other in their motions. (Id. at 136-40).

5. This "illegal overheard" caused law enforcement to interview Ramos thereafter -- apparently using this intercepted conversation of October 2, 1975 as the wedge to "turn" Ramos.

6. Defendants contended in their motion papers:

"A full hearing on this motion to suppress all the evidence received as a result of the illegal overhears...will be necessary in order for the defendant to indicate to the Court that his identity and association was learned by the police as a result of the primary illegal overheard. Therefore, all evidence against defendant is inadmissible because it is the product of an unlawful act and obtained through the exploitation of an unlawful act. "

Counsel should have the right to examine the investigating officers so as to identify and trace the unlawful overheard taps and the trail of its fruits.

It is emphasized and reiterated that the enclosed exhibits "B" through "G" reaffirms the defendants' position that can cause this Court only one conclusion -- the ultimate suppression of all the evidence gleaned from the primary illegality and the dismissal of this indictment.

II. CONTROVERSION AND SUPPRESSION OF ALL EAVESDROPPING WARRANTS AND THEIR PRODUCTS.

"the following of leads that were learned about as a result of unauthorized listening." Id. at p. 50).

See also, Applications of defendants Guarino and Dellacava found at Appendix, Vol. 1, pp. 10-24, 27-32, 33-52, 62-63, 113-119, 121-46.

11. Consequently, without the primary illegal overheard the defendants Capra, Guarino and Dellacava would not have been identified by the Government ⁷ and their connection to Ramos would not have been disclosed.

12. There was an indication in the record that Ramos may have been identified as a witness as a result of a series of wiretaps. This application clearly establishes the tainted use of the illegal wiretaps. See U.S. v. Tane, 329 F2d 848; U.S. v. Williams F2d . Furthermore, the claim was made by the defendants in their written motions that there was a tainted connection. Yet, because that claim was based upon the primary illegality of the Diane's Bar wiretaps, the defense was precluded at the pre-trial stage from offering evidence because this Court had not yet decided whether there, in fact, existed a primary illegality and thereafter the defense was precluded from post-trial relief because the District Court erroneously concluded that there was no primary illegality.

12. Defendants at this stage now have the standing to show this Court that the discovery and use of Ramos came about as a result of the illegal wiretap occasioned upon the defendants

7. The Government conceded that:

"the identities of Capra, Guarino and Dellacava were not known to the police when the first order was issued on December 8, 1971"
The Government's Memorandum of Law in Opposition to Motions of Defendants Capra, Guarino and Dellacava at p. 7.

Capra, Guarino and Dellacava. ⁸. (See U.S.A. v. Capra, et al., Footnote 2 at p. 4999). They had, in good faith, urged the primary illegality of the Diane's Bar wiretaps and the taint of the subsequent evidence uncovered as a result thereof. They had, in good faith, attempted to make a record for this Court and had in fact apprised this Court that Ramos as a witness may be tainted both in their motion papers and in open Court. The magnitude of evidence uncovered by each wiretap ¹⁰. precluded particularization of each and every item of evidence seized and the defendants could only put before this Court as Exhibits all the succeeding applications which contained, in the main, the evidence thought to be pertinent by the surveilling officers.

⁸On September 12, 1973, the defendants Capra, Guarino and Dellacava stated: "It is essential that the Court view the balance of the electronic surveillance with regard to his matter ... to show the overall pattern of unrestrained interceptions and recording." (Memorandum of Defendants, Capra, Guarino and Dellacava at p. 6).

⁹. There were eleven wiretap or bug authorizations and applications subsequent to Diane's Bar.

1. March 9, 1972 - Ray's Stationery Store warrant.
2. April 8, 1972 - Ray's Stationery Store warrant.
3. May 8, 1972 - Ray's Stationery Store warrant.
4. June 11, 1972 - Steve's Air Conditioning.
5. July 12, 1972 - Steve's Air Conditioning.
6. August 15, 1972 - Steve's Air Conditioning.
7. September 15, 1972 - Steve's Air Conditioning.
8. September 18, 1972 - for a "bug" at 1023 Havemeyer Avenue.
9. October 18, 1972 - for an extension of the "bug" and phone tap.
10. February 15, 1973 - for a "bug" in Whitestone, Queens.
11. March 20, 1973 - for an extension of the "bug" in Whitestone, Queens.

13. Since the motions filed by the defendants Capra, Guarino and Dellacava present a prima facie demonstration of taint and since the Circuit Court of Appeals has declared the wiretaps subsequent to Diane's Bar tainted, an adversary hearing is required to determine whether, in fact, the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps, or he was caused to testify by the use of this tainted evidence. *

14. This Court is aware of the history of the objections made to Ramos' testifying and its finding that if the wiretaps were ruled illegal that "at a minimum" the matter would be brought before this Court for a hearing. In view of the fact that the wiretaps were originally held to be proper by this Court taint hearings were ruled out and the defendants were thereby prevented from developing facts at a hearing.

15. The record in the Court of Appeals indicated that the objections were made but the facts were not able to be developed without a hearing. We have herein presented our case for a taint hearing by explaining to this Court that use of Ramos should be suppressed due to his testimony which was caused by the use and flow of illegal overheards.

16. We have presently submitted to the Court the affidavit of Navarro which clearly indicates that Ramos was aware of the conversations discovered on the illegal wiretap and that these conversations were used on his behalf thereby causing him to be a witness for the Government.

17. The cases of collateral attack as presented in the Government's affidavit refer to suppression hearings that were held and denied by the trial court. No such taint hearing was heard in this Court, nor were the added facts in the record to clearly show Ramos' "taint factor". The Government does not refute the issue other than through conclusion that Ramos cooperated with the Government and testified as a result of the illegal surveillance gathered in by the Government. In fact, there is no question that Ramos did listen to wiretaps as is stated in the record. Furthermore, the Government convinced Ramos that they could and would vacate his Toledo conviction by convincing Judge Connors that, in fact, was innocent. If the tapes or their existence were not disclosed to Ramos the evidence derived therefrom was obviously used to convince him that the Government had the means to help him. -- the use of the illegal interceptions clearly established and caused Ramos to be a Government witness.

18. This Court has clearly expressed its distaste for the defendants and the crimes that they have committed. However, they should not be denied the substantial rights that all defendants are entitled to regardless of criminal activity. Knowing that platitudes do not aid defendants we are constrained to quote Judge Friendly's statement in the recently decided case of U.S.A. v. Morell and Bruzon:

"The republic shall not perish if these men go free."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN CAPRA, LEOLUCA GUARINO
and STEPHEN DELLACAVA,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

:
: AFFIDAVIT IN RESPONSE
: TO REPLY AFFIRMATION

: 75 C. 6183

: RELATED CASE
: 73 Cr. 460
: (M.E.F.)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

GERALD A. FEPPER, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney
in the office of Thomas J. Cahill, United States Attorney
for the Southern District of New York, and as such am
in charge of and familiar with the above-captioned case,
I make this affidavit in response to a "Reply Affirmation"
submitted in support of the motion of defendants Capra,
Guarino and Dellacava for post-conviction relief pursuant
to 28 U.S.C. §2255, or alternatively for a new trial
pursuant to Rule 33 Fed. R. Cr. P.

2. In his "Reply Affirmation" Mr. Slotnick,
failing to address himself to the obvious insufficiency of
the affidavit of one Hippolito Navarro, chooses instead to
take issue with what we thought was an indisputable fact —
that the identical claim raised here was presented to and

rejected by the Court of Appeals and the Supreme Court. In response, we simply invite the Court's attention to Mr. Slotnick's Petition for Rehearing and Suggestion for Rehearing en Banc, attached hereto as Exhibit A. This Petition bears remarkable similarity in both form and substance to Mr. Slotnick's "Reply Affirmation." Indeed, Mr. Slotnick has simply lifted, almost verbatim, pages two through ten of his Petition and filed them here as his "Reply Affirmation" (See ¶s 2-13 in Reply Affirmation). The Court of Appeals rejected this Petition for remand and a taint hearing. The Supreme Court denied Movants' Petition for Certiorari.

3. The basis for the decision of the Court of Appeals is clear. The trial record clearly establishes police awareness of Ramos' connection with movants not only before the interception of October 2, 1972, but well before the initial wiretap at Diane's bar, and further provides no basis for the speculation that his agreement to cooperate was motivated by the interception, rather than by the conclusion of related state proceedings against him, or, indeed, by any other motivation. (See the Government's Brief in opposition to the Petition for a Writ of Certiorari, pp.7-9, attached hereto as Exhibit B, for the relevant trial testimony and transcript citations). Movants' attempt to overcome this through the guise of allegedly newly discovered evidence presented in the affidavit of Hippolito Navarro fails for the reasons set forth in paragraphs 10-12 of my affidavit of December 5, 1975.

BF:mi

WHEREFORE, the Government respectfully submits that the motions of Capra, Guarino and Dellacava should be denied summarily.

GERALD A. FEFFER
Assistant United States Attorney
Assistant Chief, Criminal Division

Sworn to before me this
day of December, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x

DOCKET NO. 74-1037

UNITED STATES OF AMERICA

v.

JOHN CAPRA, et al.
Defendant-Appellant.

----- -x

ON APPEAL FROM THE JUDGMENT OF CONVICTION
FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK (73 Cr. 460).

PETITION FOR REHEARING
AND SUGGESTION FOR RE-
HEARING EN BANC

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS :

Appellant, John Capra, respectfully petitions this Court for a rehearing and respectfully suggests that a rehearing be held en banc. On the 26th day of July, 1974, this Court suppressed the wiretaps relating to this case and dismissed the first count of the indictment in the court below (73 Cr.460). The defendants, Guarino and Dellacava, have joined in the points raised in this petition in their separate petitions for rehearing.

In the opinion¹ suppressing the wiretaps and reversing

1. United States v. Capra, et al., Docket No. 74-1068; No. 998; decided July 26, 1974 - Per Circuit Judges Anderson, Feinberg and Mansfield.

the first count this Court also affirmed the "substantive" counts relating to the aforementioned indictment which were 2, 3, 4 and 5. This petition for rehearing is accompanied by a request that this Court remand the above entitled matter for the purposes of a taint hearing as a result of this decision in suppressing the wiretaps herein.

It was the obvious intention of the Trial Court that a taint hearing would be held only if the Diane's Bar wiretaps were found to be illegal and in any event this relief would only be considered post trial. Accordingly, as a result of the trial Court's decision upholding the legality of the Diane's Bar wiretap, no taint hearing tracing the flow of information from Diane's Bar to the subsequent wiretaps and surveillance could occur.² (appendix - Vol. 4, pp. 1126-29). As a matter of fact, the Court repeatedly

-
2. The defendant's attempt to trace the investigation subsequent to the Diane's Bar wiretaps was cut off by the District Court. At that time, Detective Eaton was asked whether he commenced an investigation of Ray's Stationery Store after following Dellavaca there as a result of wiretap surveillance at Diane's Bar. The Government's objection to questions concerning subsequent investigations was sustained by the District Court. (Appendix, Vol. 4 - p. 1126). Accordingly, no further inquiry was allowed by the Court to trace the taint of the primary illegality alleged and the District Court clearly stated to the defense that it would consider taint

"at a much later time because I don't know what evidence the Government proposes to adduce at the trial. If I order the fruits of this wiretap suppressed, I think the ball is then in the Government's court and it is the Government's obligation to see that none of the fruits obtained directly or indirectly as a result of that illicit cave-dropping is used at the trial." Id. at 1127.

overruled counsel's request for a pre-trial taint hearing and envisioned that a taint hearing could only be held post-trial if the wiretaps were suppressed. An example of that colloquy is the following:

"MR. SLOTNICK: Well, if Your Honor does not suppress and Your Honor is wrong in doing that, then we have a problem back in the Court of Appeals and I hope at least to establish a part record now, where it wouldn't be necessary, if it does happen to send it back down here.

THE COURT: I assume it is going to be reversible error if I fail to suppress this wiretap and it should have been suppressed. I would hope I am not sitting long days and Sundays on something that is liable to be an academic question ... I think that if that is reversible error in overruling your minimization contention, Mr. Slotnick, we can all fairly predict as lawyers that the Court of Appeals AT A MINIMUM IS GOING TO SEND THE CASE BACK TO HEAR TAINT and all kinds of other things. Therefore, I don't see any reason to anticipate that now and trail all the way through the remote direct or indirect consequences of these taps. So on the grounds I tried to outline for you in the past, I want you to limit this hearing ... as it affects the question whether the evidence from these taps ought to be suppressed." (Appendix, Vol. 4 pp. 1127-1128) (emphasis added).

Subsequently, the defendants Capra, Guarino and Dellacava again raised the issue with regard to a TAINT HEARING. As counsel stated:

"One last thing, and I express confusion at this point, Your Honor indicated that he would hold, if there be a trial and if there be a conviction, any Taint Hearing which will be held at the end of the Trial. That was something Your Honor had mentioned on our first day.

I have submitted some lengthy papers with regard to leads and identity of witnesses and whatever of what I consider illegal taint records and warrants. Will that be held at the end of the Trial or do you want me to mention it specifically now?

THE COURT: ... What I mean to convey to you is simply that if and when there is a Taint Hearing, it would follow rather than precede the Trial. I don't want you to leave here today or at any time with the understanding that a Taint Hearing is an inevitable feature of your future.

... THE COURT: ... I don't mean to stop for a few days for a voir dire either on Taint problems during the trial. But I do mean to let you preserve that objection on any occasion when you perceive that might be pertinent and it is up to you to reserve it." (Appendix, Vol. 5 pp. 1583-1586).³

Thereafter, the defendants pursued the point as to the witness Ramos.

"... My chief concern, and I don't think it is a great secret, is that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos and I would move to suppress the witness Ramos ...". (Appendix, Vol. 5, pp. 1585-86).

Nevertheless, the Court of Appeals stated in its opinion:

"There is no indication in the record, nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretap ...". (U.S.A. v. Capra, et al. slip op. at p. 5010),

3. Subsequent to the Government's Opening and prior to the Opening for the defendants' counsel stated the following to the Court: "MR. SLOTNICK: I am also constrained for the purpose of the record at this time to move ... at least suppress as a result of this statement of the Government. It is my belief that most of the evidence will come as a result of tainted sources. THE COURT: All right denied." Trial Record 27-28.

apparently overlooking the above portions of the record.

With regard to the defendants' motions to suppress the wiretaps and the evidence derived therefrom, the Trial Court determined that if he found the wiretaps to be proper then the Taint Hearing would only be held upon a reversal of his position by this Court which would "at a minimum" remand this matter back for a taint Hearing. (Appendix Vol. 4, pp. 1127-1128).⁴ The Trial Court's post-trial decision upholding the legality of the Diane's Bar wiretap thereby foreclosed any taint inquiry based on that wiretaps illegality and the consequent illegalities which flowed and tainted the subsequent taps and the information derived therefrom.⁵

4. The procedure adopted by the District Court holding in obedience any taint issue until after a decision was made as to the alleged primary illegality, the wiretapping at Diane's Bar comports with that stated in Alderman v. United States, 394 U.S. 165 (1969) wherein the Supreme Court

"remanded to the District Court ... for a hearing findings and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance." Id. at 186. (Emphasis added).

See also, United States v. Schipani, 414 F. 2d 1262 (2nd Cir., 1969); United States v. Maggadino, Docket No. 73-1933, decided May 2, 1974, p. 3101; United States v. Paroutian, 299 F. 2d 486 (2nd Cir., 1962); United States v. Cole, 463 F. 2d 163 (2nd Cir., 1972); United States v. Falley, decided November 28, 1973, at p. 544).

The Trial Court did, however, leave open the opportunity for any defendant to show taint flowing from later wiretaps which might be defective if "studied for minimization." (Footnote 1 of Memorandum dated December 4, 1973, Appendix, Vol. 1-p. A-227). The defendants, however, claimed taint not from any failure to minimize any particular wiretap but from the primary illegality of the Diane's Bar wiretap which flowed and supported each suspending wiretap authorization.

The motions submitted by the defendants Capra, Guarino and Dellacava had traced each wiretap and the underlying affidavits which were attached as exhibits. One of those attached and discussed in the motion papers - the Extension of Eavesdropping Warrant dated October 18, 1972, clearly revealed that eavesdropping conducted on October 2, 1972

"connects GUARINO, DELLACAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971." (See Detective Eaton's affidavit of October 18, 1972 attached as Exhibit "F" to the motions filed prior to trial. Appendix, Vol. 1 - p. A-22).

After hearing the conversation of October 2, 1972, Detective Eaton further stated that

"Dellacava, Capra, the unknown male, and Guarino have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes." Ibid.

Thus, the first awareness that the Government had that Guarino, Capra and Dellacava had any connection with Ramos concerning any narcotics transactions came as a result of eavesdropping which this Court has considered to be tainted by the primary illegality of the Diane's Bar wiretap. For, as this Court stated:

"... Reversal of the conspiracy count as to Capra, Guarino and Dellacava, is mandated by both the illegal wiretapping after December 19 and the resulting taint of police surveillance and subsequent wiretaps ...". (Slip op. at p. 4999) (Emphasis added).

It was clear, however, and this Court found that

"the defendants contended that if the Trial Court upheld any of these objections (to the Diane's Bar wiretaps), all evidence which was the product of this wiretap should be suppressed." (Slip op. at p. 4996).⁶

The pertinent wiretap applications including the major one which obviously lead to the discovery of Ramos were before the Trial Court and there can be no question but that the identity of Ramos and his connection with Capra, Guarino and Dellacava were discovered as a result of the conversation overheard at the Havermeyer Club on October 2, 1972 the conversation together with its direct flow to Ramos is prima facie, the result of listening of the wiretaps). (See paragraph 4(b) at Appendix, Vol. 1,

6. The motions filed on behalf of Capra, Dallacava and Guarino, traced the illegality of the Diane's Bar wiretaps through each succeeding wiretap ending with bugs which were installed and listened to at 1023 Havermeyer Avenue, Bronx, in September - October 1972 and in a Whitestone apartment in February, 1973. Defendants specifically noted that all of the wiretaps were based upon the original order of December, 1971 and that he asks suppression "of all of the evidence that flowed therefrom as a result of the original and continuing taint." (Affidavit of Barry Ivan Slotnick, Vol. 1 of the Appendix, p. A-52). Guarino's motion attached each of the wiretaps and bugs which were conducted continuously from December 1971 through February, 1973 and made demand pursuant to Rule 41 E of the Federal Rules of Criminal Procedure "for a hearing in regard to the suppression of the above mentioned evidence and all evidence resulting therefrom." (Emphasis added.) (Affidavit of Dennis D. S. McAlevy at Vol. 1, pp. A-118-119 of the Appendix filed herein.) Guarino also claimed that the evidence obtained from the Diane's Bar wiretap was used as a basis for each succeeding wiretap commencing with the wiretap at Ray's Stationery Store and ending with the Havermeyer bug in the Whitestone bug. Id. at 121, 140. In addition, each of the above defendants joined the other in their motions. (Id. at 136-40).

p. A-22). Therefore, this Court's statement that there is no indication the police identified Ramos or asked him to testify as a result of the evidence uncovered by the wiretaps is premature if not incorrect.⁷

Consequently, without the primary illegal overheard the defendants Capra, Guarino and Dellacava would not have been identified by the Government⁸ and their connection to Ramos would not have been disclosed.

7. Defendants contended in their motion papers:

"A full hearing on this motion to suppress all the evidence received as a result of the illegal overheard ... will be necessary in order for the defendant to indicate to the Court that his identity and association was learned by the police as a result of the primary illegal overheard. Therefore, all evidence against defendant is inadmissible because it is the product of an unlawful act and obtained through the exploitation of an unlawful act.

Counsel should have the right to examine the investigating officers so as to identify and trace the unlawful overheard taps and the trail of its fruits.

It is emphasized and reiterated that the enclosed exhibits "B" through "G" reaffirms the defendants' position that can cause this Court only one conclusion--the ultimate suppression of all the evidence gleaned from the primary illegality and the dismissal of this indictment.

II.

CONTROVERSION AND SUPPRESSION OF ALL EAVESDROPPING WARRANTS AND THEIR PRODUCTS.

"the following of leads that were learned about as a result of unauthorized listening." (Id. at p. 50).

See also, Applications of defendants Guarino and Dellacava found at Appendix, Vol. 1, pp. 10-24, 27-32, 33-52, 62-63, 118-119, 121-46.

The Government conceded that

"the identities of Capra, Guarino and Dellacava were not known to the police when the first order was issued on December 8, 1971." The Government's Memorandum of Law in Opposition to Motions of Defendants Capra, Guarino and Dellacava at p. 7.

There was a clear indication in the record that Ramos may have been identified as a witness as a result of a series of wiretaps. Furthermore, the claim was made by the defendants in their written motions that there was a tainted connection. Yet, because that claim was based upon the primary illegality of the Diane's Bar wiretaps, the defense was precluded at the pre-trial stage from offering evidence because the District Court had not yet decided whether there, in fact, existed a primary illegality and thereafter the defense was precluded from post-trial relief because the District Court erroneously concluded that there was no primary illegality.

Defendants at this stage now have the standing to show the Court below that the discovery of Ramos came about as a result of the illegal wiretap occasioned upon the defendants Capra, Guarino and Dellacava.⁹ (See U.S.A. v. Capra, et al., Footnote 2 at p. 4999). They had, in good faith, urged the primary illegality of the Diane's Bar wiretaps and the taint of the subsequent evidence uncovered as a result thereof. They had, in good faith, attempted to make a record for this Court and had in fact apprised the Trial Court that Ramos as a witness may be tainted both in their motion papers and in open

9. On September 12, 1973, the defendants Capra, Guarino and Dellacava stated:

"It is essential that the Court view the balance of the electronic surveillance with regard to this matter ... to show the overall pattern of unrestrained interceptions and recording." (Memorandum of Defendants Capra, Guarino and Dellacava at p. 8).

Court. The magnitude of evidence uncovered by each wiretap¹⁰ precluded particularization of each and every item of evidence seized and the defendants could only put before the Trial Court as Exhibits all the succeeding applications which contained, in the main, the evidence thought to be pertinent by the surveilling officers.

Since the motions filed by the defendants Capra, Guarino and Dellacava presented a prima facie demonstration of taint and since this Court has declared the wiretaps subsequent to Diane's Bar tainted, an adversary hearing is required to determine whether, in fact, the police identified Ramos and asked him to testify as a result of evidence uncovered by the wiretaps. Adlerman v. United States, supra.

Accordingly, it is requested that Counts 2, 3, 4 and 5 of the indictment herein be remanded to the District Court with instructions that a hearing be held to determine the foregoing questions.

The defendant, Capra, hereby joins in the points raised in the petitions of the defendants Guarino and Dellacava where applicable.

Dated: New York, New York
August 8, 1974

Respectfully submitted,
s/ Barry Ivan Slotnick
BARRY IVAN SLOTNICK

10. There were eleven wiretap or bug authorizations and applications subsequent to Diane's Bar.

1. March 9, 1972-Ray's Stationery Store warrant.
2. April 8, 1972-Ray's Stationery Store warrant.
3. May 8, 1972-Ray's Stationery Store warrant.
4. June 11, 1972-Steve's Air Conditioning.
5. July 12, 1972-Steve's Air Conditioning.
6. August 15, 1972-Steve's Air Conditioning.
7. September 15, 1972-Steve's Air Conditioning.
8. September 18, 1972-for a "bug" at 1023 Rivemayer Avenue.
9. October 18, 1972-for an extension of the "bug" and phone tap.
10. February 15, 1973-for a "bug" in Whitestone, Queens.
11. March 20, 1973-for an extension of the "bug" in Whitestone, Queens.

ATTORNEY'S CERTIFICATE

I, BARRY IVAN SLOTNICK, attorney for defendant-appellant,
BEN CAPRA, do hereby certify that the within petition is presented in
good faith and not for reasons of delay.

s/ Barry I. Slotnick

BARRY IVAN SLOTNICK

ARGUMENT

1. The court of appeals held that "none of the evidence resulting from the illegal wiretaps was used to prove the guilt of [petitioners] on the substantive charges" (Pet. App. A23, A24), the last of which was committed about two months before the interceptions commenced. Accordingly, while it suppressed certain of this wire interception evidence and reversed the conspiracy conviction to which the evidence related, the court below affirmed the substantive convictions. This ruling was correct and petitioners' contentions relating to the wire interception evidence have no substance.

a. Petitioners assert that their connection with witness Ramos was first discovered in October 1972 as a result of a chain of events traceable to electronic surveillance undertaken ten months earlier, which the court of appeals held to have been unlawful. Therefore, they submit that all of Ramos's testimony at trial should be suppressed as "fruit of the poisonous tree."

We rely on the finding of the court below, which is supported by the testimony at trial, that "[t]here is no indication in the record nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps" (Pet. App. A24).⁵

⁵ Petitioners argue that the court of appeals erred in concluding that they did not claim that the identification of Ramos resulted from an illegal interception, pointing to counsel's statement at trial that "My chief concern *** is that the witness

Undisputed testimony about police visual surveillance of witness Ramos, which took place before any of the telephone monitoring, shows that on November 5, 1970, Ramos was followed from a restaurant to the Havermeyer Social Club, which petitioner DellaCava entered shortly thereafter. Approximately half an hour later, Ramos and DellaCava were observed leaving the club together (Tr. 1330-1334). On December 2, 1970, Ramos made two trips to the Havermeyer Social Club, where he spent most of the evening. During his stay there, at approximately 9:00 p.m., co-defendant Jermain entered the club; at approximately 10:00 p.m., petitioner DellaCava drove up in a green Ford and entered the club (Tr. 1041, 1111-1112). On December 7, 1970, co-defendant Jermain was observed meeting Ramos and driving him to the Havermeyer Social Club. After a brief period of time in the club, both men went to a restaurant

Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos." (Pet. 89). But this bare suggestion that there might be "some illegality" which led to the discovery of Ramos is far from a specific claim that the interception led to his identification. Even now, petitioners base their claim simply on the assertion that, since Ramos agreed to cooperate with this investigation one month after references to his part in the conspiracy were overheard, there is a "reasonable inference" that the monitoring led to the identification and agreement to testify (Pet. 85). As we note, infra, however, the record clearly establishes police awareness of Ramos's connection with petitioners before the interception and provides no basis for the speculation that his agreement to cooperate was motivated by the interception, rather than by the conclusion of related state proceedings against him, or, indeed, by any other motivation.

where they parked directly across the street from the green Ford that DellaCava had been driving on December 2, 1970 (Tr. 1041, 1113). Approximately forty-five minutes later, Jermain left the restaurant and picked up co-defendant Morris. A few minutes later, DellaCava left the restaurant with five people (Tr. 1041-1042). There was also testimony that, during the first quarter of 1971, Capra was observed on approximately six occasions driving a car that was being watched in connection with the investigation of Ramos and Jermain (Tr. 2964, 2992-2996).

From this testimony it is clear that the police had identified petitioners and were aware of their connection with Ramos before the monitoring of DellaValle started.⁶ Therefore, petitioners' unsupported assertion that Ramos's testimony is a fruit of the suppressed wire interceptions is erroneous.⁷

b. Petitioners assert that the wire interception evidence, part of which was suppressed by the Court below (Pet. App. A8-A16), was "the real corroborative evidence of Ramos' testimony concerning petitioners' roles as suppliers" (Pet. 81). Therefore, they contend that its introduction at trial requires a new trial or re-sentencing.

⁶ Petitioners were not known to be associates of DellaValle. This explains what petitioners call the government's concession (Pet. 17 n. 10) that the identities of petitioners were not known to the police when the first wire interception order was issued on December 8, 1971.

⁷ In this factual setting, there is no reason to reach the question whether the testimony of a live witness acting through his individual volition and choice should ever be considered tainted as the fruit of an improper interception.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN CAPRA, LEOLUCA GUARINO
and STEPHEN DELLACAVA,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

APPLICATION PURSUANT
TO 28 USC 2255

75 C 6183 -

Related Case
73 CR 460
M.E.F.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed petition of JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA, by their attorney, BARRY IVAN SLOTNICK, and upon all of the proceedings had herein, the undersigned will move this Court to vacate, set aside or correct the sentence imposed upon the above named petitioners, JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA, pursuant to Title 28 USC Section 2255 and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
December 9, 1975

Yours, etc.

BARRY IVAN SLOTNICK
Attorney for Petitioners
Capra, Guarino and Dellacava
233 Broadway
New York, New York 10007

TO: THOMAS J. CAHILL
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOHN CAPRA, LEOLUCA GUARINO
and STEPHEN DELLACAVA,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.
-----X

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PETITION

75 C

Related Case

73 CR 460

M.E.F.

BARRY IVAN SLOTNICK, on behalf of the petitioners,

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA, respectfully
show to the Court:

1. That the Petitioners are presently serving sentences
imposed by this Court at Atlanta Federal Penitentiary in the
Northern District of Georgia.

2. That on November 21, 1975 the above named petitioners
filed an application* before the Court requesting the following
relief:

"(a) Grant a new trial to the defendants;
(b) dismissing the indictment herein; or in
the alternative (c) granting a hearing to esta-
blish the illegality of the Government's evidence
against the defendants on the grounds that the
defendants' conviction was caused as a result of
a deprivation of their constitutional and statu-
tory rights and for such other and further relief
as to the Court is just and proper."

The aforementioned relief was predicated not only upon the Federal
Rules of Criminal Procedure but also upon the remedy arising from

*Annexed and Incorporated By Reference.

the civil proceeding pursuant to 28 USC Section 2255.

3. That the procedure relevant to the aforementioned post-conviction relief section envisions the civil proceeding, petition and civil index number*.

4. In order to alleviate the procedural problem caused by the joint relief requested, we are filing this petition pursuant to 28 USC Section 2255 and are purchasing a separate civil docket number**.

5. For the purpose of this application, we restate and reallege all of the paragraphs of the affidavit of Barry Ivan Slotnick, dated November 20, 1975, and entitled United States of America v. John Capra, Leoluca Guarino and Stephen Dellacava, Defendants, which bears Index No. 73 CR 460 and is presently pending before this Court. We further incorporate by reference all of the exhibits, memoranda of law, together with all of the other papers and proceedings attendant to that application.

6. Petitioners further show to this Court that they have a proper issue to be litigated -- which same issue is contained in the application of November 21, 1975 (United States of America v. Capra, Guarino and Dellacava, 73 CR 460).

7. Petitioners therefor ask that this Court order:

* "A §2255 proceeding...is...independent civil suit...the Clerk of the District Court must collect a docket fee..." U.S. v. Huss and Smilow, 520 F2d, 598 (2nd Cir. 1975)

** This procedure is being utilized even though the Government appears to have waived the statutory format. Apparently, this Court could not have jurisdiction unless and until a civil docket number was received on the moving papers.

(a) A new trial to the defendants;

(b) That the indictment be dismissed; or in the alternative

(c) a hearing to establish the illegality of the Government's evidence against the petitioners and that said evidence be suppressed, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
December 9, 1975

BARRY IVAN SLOTNICK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
4. These last two points do not merit extensive
discussion since movants fail to explain, even remotely, how
the use of allegedly illegal electronic surveillance to
obtain evidence in this case is a violation of the Fourth Amendment.
The use of such surveillance is a lawful conviction in Ohio and to identify
persons "materially affects" their constitutional or
statutory rights.
-----X

UNITED STATES OF AMERICA :

- v - :

JOHN CAPRA,
LEOLUCA GUARINO and
STEVEN DELLACAVA,

Defendants. :

AFFIDAVIT

73 Cr. 460 (MEF)


STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

GERALD A. FEFFER, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in
the office of Thomas J. Cahill, United States Attorney for
the Southern District of New York, and as such am in charge
of and familiar with the above-captioned case. I make this
affidavit in opposition to the motion of defendants, Capra,
Guarino and Dellacava for post-conviction relief pursuant to
28 U.S.C. § 2255, or alternatively for a new trial pursuant
to Rule 33 Fed. R. Cr. P.

2. John Ramos was a co-conspirator with Capra,
Guarino and Dellacava in their narcotics transactions.
Ramos testified for the Government against the movants at
their trial.

3. Movants contend that the Government used
electronic surveillance in order (a) to identify Capra,
Guarino and Dellacava as co-conspirators of Ramos and to
induce Ramos to testify against them, (b) to establish that
Ramos was not guilty of possessing certain narcotics in
Toledo, Ohio, and (c) to identify Joseph Messina as the
person who actually possessed the narcotics in Toledo, Ohio.


admitted

4. These last two points do not merit extensive discussion since movants fail to explain, even remotely, how the use of allegedly illegal electronic surveillance to remedy Ramos's wrongful conviction in Ohio and to identify Messina "materially affects" their constitutional or statutory rights.

5. The heart of movants' claim is that Ramos's testimony is tainted by the use of illegal wiretaps. Movant have presented the identical claim in the past. It was raised in the Court of Appeals and it was rejected there. It was raised in a petition for certiorari and the Supreme Court denied the petition. United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). Movants have conspicuously failed to bring these facts to the Court's attention.

6. In ruling on the Capra case, the Court of Appeals held:

"The record shows that none of the evidence resulting from the illegal wiretaps was used to prove the guilt of any of the defendants, Capra, Guarino, Dellacava and Jermain, on the substantive charges, Counts 2, 3, 4 and 5. All of the events relating to these four counts, and all of the relevant events encompassed in the counts, occurred prior to the installation of the wiretap; moreover Ramos' testimony on these charges was independently corroborated. There is no indication in the record nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps. See Wong Sun v. United States, [371 U.S. 471 (1963)]" 501 F.2d at 281-2 (emphasis supplied).

7. Capra tried once more in the Court of Appeals. In his Petition for Rehearing, he took issue with this holding,

"there can be no question but that the identity of Ramos and his connection with Capra, Guarino and Dellacava were discovered as a result of the conversation overheard at the Havermeyer Club on October 2, 1972 (the conversation together with its direct flow to Ramos is prima facie, the result of listening to the wiretaps). Therefore, this Court's statement that there is no indication the police identified Ramos or asked him to testify as a result of the evidence uncovered by the wiretaps is remature if not incorrect." (Capra Petition for Rehearing and Suggestion for Rehearing En Banc, pp. 7-8) (Appendix, page references omitted)

The Court of Appeals once more rejected this contention and denied the Petition for Rehearing. (Order of Court of Appeals, September 27, 1974).

8. This same issue was raised, yet again, in Movants' Petition for Certiorari (pp. 83-91), and that petition was denied by the Supreme Court, 420 U.S. 990 (March 24, 1975).

9. Having been raised and rejected on direct appeal, this issue cannot be relitigated in a collateral challenge under 28 U.S.C. § 2255.

10. Precluded from a collateral attack, Capra, Guarino and Dellacava now present this much-litigated contention in the guise of allegedly newly discovered evidence. This motion for a new trial is bottomed on the affidavit of one Hippolito Navarro. The facts of Navarro's affidavit, even if believed, fail to establish a claim on either the law or the facts which would warrant the relief requested and, in fact, do not raise an issue which requires a hearing. No overblown interpretation of the affidavit can lead to a different result.

11. In paragraph 13 of his affidavit in support of the motion Mr. Slotnick claims that "Navarro's affidavit (Exhibit C) clearly demonstrates that the illegally seized conversation of October 2, together with the illegally seized information concerning Joseph Messina, obtained by Nauens, were the instruments by which Ramos' testimony was bargained for and procured." This tortured interpretation of the Navarro affidavit is clearly belied by the most cursory reading. Nowhere in this affidavit is it suggested that Ramos was even informed of the existence of the electronic surveillance before he decided to cooperate with the Government in mid November, 1972 (Trial transcript p. 1274).

On the contrary, it defies logic to suggest that the Government would have revealed to Ramos the existence of ongoing electronic surveillance prior to his decision to cooperate for fear that he would disclose its existence.* Nor does the affidavit contain any discussion of procurement or bargaining. The Navarro affidavit simply does not contain a clear or discernible set of facts which substantiate the claims of the movants.

12. Thus while the Government is prepared to prove that Ramos was never even informed of the existence of the electronic surveillance before he decided to cooperate, the insufficiency of movants papers makes it unnecessary to do so. Moreover, even assuming argumendo sufficient factual allegations, movants' contentions are clearly spurious as a matter of law (see accompanying memorandum of law).

* Moreover, how an intercepted conversation exculpating Ramos could conceivably be used to convince him to cooperate is not explained.

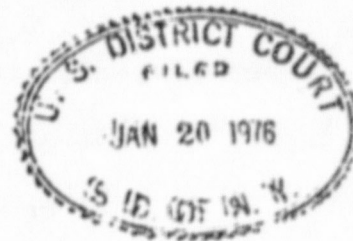
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M-1223

WHEREFORE, the Government respectfully submits
that the motions of Capra, Guarino and Dellacava should be
denied summarily.

GERALD A. PEPPER
Assistant United States Attorney
Assistant Chief, Criminal Division

Sworn to before me this
day of December, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x

UNITED STATES OF AMERICA, :

-against- :

JOHN CAPRA, LEOLUCA GUARINO, :
and STEPHEN DELLACAVA, :

Defendants. :

----- x

JOHN CAPRA, LEOLUCA GUARINO, :
and STEPHEN DELLACAVA, :

Petitioners, :

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

----- x

' 73 Cr. 460

75 Civ. 6183

MEMORANDUM

FRANKEL, D.J.

The defendant-movants were convicted after a jury trial, upon overwhelming evidence, of substantial narcotics violations. Their conviction on a conspiracy count was reversed, but the judgments and sentences on substantive counts were affirmed, 501 F.2d 267 (2d Cir. 1974). Following denial of petition for rehearing, certiorari was sought and denied, 420 U.S. 990 (1975). In the long pretrial, trial, and appellate proceedings, a broad array of legal issues was contested, including prominently issues, upon one of which defendants succeeded, arising from

assertedly unlawful wiretaps.

The movants seek now to reopen the subject of wiretapping, contending that there are new questions on which their convictions should be set aside. In the two captioned proceedings, the second having been brought to insure against procedural technicalities the Government has not invoked, the defendant-movants seek to show that the testimony of the Government's main witness against them, one Ramos, was tainted in two respects by the illegal wiretapping, and thus should have been suppressed. The first claim, hardly new, is that the Government was led to Ramos and motivated to seek his testimony as a result of information obtained from the taps. The second allegation is that information on the wiretaps which tended to prove Ramos's innocence on an Ohio charge was unlawfully used to induce Ramos to testify at defendants' trial. In the end, neither claim entitles movants to relief.

The main and sufficient flaw in the first argument is that it was fully and unsuccessfully urged in both the Court of Appeals and the Supreme Court. See, e.g., Meyers v. United States, 446 F.2d 37 (2d Cir. 1971).

One among many vivid demonstrations of this point is the remarkable similarity between energetic counsel's present Reply Affirmation and his petition for rehearing in the Court of Appeals. More tellingly, as the Government also demonstrates, both the record and the decision of the

Court of Appeals defeated the contentions now renewed.

In refuting these assertions, the Government demonstrated, both to the Court of Appeals and the Supreme Court, that its knowledge of Ramos and his involvements with defendants long antedated the improper wiretaps. Suggesting that there is something new to be heard, the movants say that the view of the Court of Appeals on this subject "is corrected by new and other evidence submitted in this proceeding." * But the two items of what is called "new and other evidence" turn out to be of no consequence to this argument.

First, there is a prisoner's affidavit saying that Ramos, in December of 1972, said he had "become aware of the existence of tapes mentioning his name as well as others, and that said tapes would guarantee him a new trial and complete vindication." Whatever Ramos might have known or said in December of 1972, the Court of Appeals was satisfied, on plentiful evidence, that his involvement in the criminal activities of concern here was known to the law

* Reply Affirmation of Barry Ivan Slotnick, p.6.

enforcement agents long before that and, most importantly, long before the eavesdropping in October 1972 upon which the movants relied in their earlier appeals and which they invoke again now.

" The second item of evidence--the transcript of Ramos's resentencing in December 1973 where it is shown that the Government discussed information obtained from the wiretaps in urging the Ohio court to suspend the remainder of Ramos's sentence-- was available to movants at the time of their appeals and is again irrelevant to their first argument here. The fact that the Government may have corroborated in a wiretap what Ramos insisted upon all along--that he had not actually been the courier in the Toledo affair--is scarcely pertinent to the issue of whether information obtained from the wiretaps led the Government to Ramos. That the Government then actually used this tap data to right a wrong in Ohio makes no difference.

Petitioners' other claim seems to be that Ramos was unlawfully induced to testify as a result of being told of evidence on the tapes that tended to exculpate him on the Ohio conspiracy count. It is alleged that the Government's efforts to procure Ramos's testimony had been futile until it "sweetened" its offer to help him obtain a reduced sentence by revealing the exculpatory information.

This speculation is probably destroyed by the existing trial record in which the petitioners explored at length the reasons and reasoning that had led Ramos to "cooperate." Moreover, it seems fantastic that government agents would have told Ramos the kind of intelligence concerning an ongoing tap that the movants would now discern in the prisoner's affidavit. But, passing that, and passing the Government's asserted readiness to refute any such claim in a hearing, the claim fails as a matter of law.

Whatever has been or is meant by the doctrine concerning "fruit of the poisonous tree," it has never been, and should not be, stretched to the length petitioners propose. The concern is not with evidence that incriminated petitioners, or touched them directly at all. The complaint here is that the Government may have learned non-incriminating facts about another person and used that innocent information to encourage that person's assistance in law enforcement. Leaving aside whether any of the petitioners have standing to make such a claim, it must be rejected as exceeding any rational bounds of the prophylactic rules.

Even in Wong Sun v. United States, the Supreme Court made clear that it was not holding that "all evidence is 'fruit of the poisonous tree' simply because it would

not have come to light but for the illegal conduct of the police." 371 U.S. 471, 488 (1963). Here, the Court of Appeals has already rejected the claim that Ramos was discovered through information on the tapes. Thus, petitioners' claim for relief must be premised on the proposition that the "fruit" doctrine applies in a situation in which a witness already known to the authorities is induced to testify after being informed that something he already knows and believes has been heard about in illegal wiretaps. To call such a witness "tainted" distorts language and any pertinent policy. And, predictably, none of the "tainted witness" cases cited or found supports petitioners' thesis. See, e.g., United States v. Tane, 482 F.2d 848 (2d Cir. 1964) (witness's identity discovered through wiretaps).

The motion in 73 Cr. 460 is denied. The petition in 75 Civ. 6183 is dismissed.

It is so ordered.

MARVIN E. FRANKEL

Dated, New York, New York

January 20, 1976

U.S.D.J.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 5 day of April, 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Appendix upon U.S. Atty. So. Dist. of NY herein, by delivering a true the Appellee copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 5 day of April 19 76


Edward Bailey


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973